CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 121.

THE NORTHERN LUMBER COMPANY, APPELLANT,

vs.

WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, AND MARY E. COFFIN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED SEPTEMBER 29, 1905.

(19,915.)

(19,915.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 121.

THE NORTHERN LUMBER COMPANY, APPELLANT,

vs.

WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, AND MARY E. COFFIN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Page.
Caption	*a*
Transcript from the circuit court of the United States for the district of Minnesota	1
Caption	1
Precipe for transcript	1
Bill of complaint	2
Portion of section 3 of act of July 2, 1864	3
Letter, Commissioner of General Land Office to Register and Receiver, Duluth, May 26, 1864	6
Decision of Secretary of Interior, July 16, 1901	7
Precipe for subpœna in chancery	13
Subpœna to Mary E. Coffin and marshal's return	13
Appearance for defendants, William O'Brien *et al.*	14
Answer of William O'Brien *et al.*	15
Section 3 of act of July 2, 1864	15
Portion of act of Congress approved July 31, 1876	21
Replication	22
Stipulation of facts	23
Portion of section 3 of act of July 2, 1864	23

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 4, 1906.

Page.
Letter, Commissioner General Land Office to Register and Receiver at Duluth, May 26, 1864 26
Letter, Commissioner General Land Office to Register and Receiver at Duluth, November 2, 1866..... 27
Letter, Secretary of the Interior to Commissioner of General Land Office, March 19, 1901. 28
Decision of Secretary of Interior, July 16, 1901..... 31
Exhibit A—Certified copy of map of the general route of the Lake Superior and Mississippi railroad, filed May 7, 1864. 37
Decision, filed August 18, 1903. 39
Petition for leave to file supplemental bill of complaint..... 43
Stipulation for order granting leave to file supplemental bill, etc 44
Order granting leave to file supplemental bill of complaint, etc.. 46
Supplemental bill of complaint 46
Answer of William O'Brien *et al.* to supplemental bill.. 53
Replication to answer to supplemental bill 54
Order fixing time for taking testimony..... 55
Stipulation for order setting cause for final hearing 55
Order setting cause for final hearing 55
Opinion of the court on final hearing 56
Decree, January 24, 1905 58
Petition for and order allowing appeal 59
Assignment of errors..... 60
Bond on appeal..... 60
Citation and admission of service 62
Admission of service of citation by Mary E. Coffin. 62
Clerk's certificate to transcript..... 63
Appearance of counsel for appellant..... 64
Appearance of counsel for appellees..... 65
Order of submission..... 65
Opinion..... 65
Decree..... 75
Petition for and order allowing appeal..... 76
Assignment of errors 77
Bond on appeal..... 78
Citation and proof of service..... 80
Clerk's certificate to transcript..... 81

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, begun and held at the United States Court House in the City of St. Paul, Minnesota, on the first Monday in May, to-wit: the first day of May, A. D. 1905, before the Honorable Willis Van Devanter, Circuit Judge, and the Honorable John E. Carland and the Honorable John C. Pollock, District Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the fourth day of March, A. D. 1905, a transcript of record, pursuant to an appeal allowed by the Circuit Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The Northern Lumber Company was Appellant, and William O'Brien, *et al.*, were Appellees, which said transcript of record is in the words and figures following, to-wit:

1 United States Circuit Court, District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
No. 403. vs. Equity.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Appearances: James B. Kerr and M. T. Sanders, St. Paul, Minnesota, Solicitors for Complainant.
J. N. Searles, Stillwater, Minnesota, Solicitor for Defendants.

Pleas in the United States [Circuit] Court, District of Minnesota, and Fifth Division thereof, in the above entitled cause.

Be It Remembered, That on the 3rd day of February, A. D. 1905, there was filed with the Clerk of said Court, at his office at Duluth, in the said District and Division. A Praecipe for the Record on Appeal in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, for the Eighth Circuit.

Northern Lumber Company, a corporation, Appellant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Appellees.

To Thos. H. Pressnell, Deputy Clerk of the Circuit Court of the United States for the District of Minnesota, Fifth Division:

2 An appeal having been taken and allowed from the decree of the Circuit Court of the United States for the District of Minnesota, Fifth Division, in the above entitled cause, please prepare and transmit as your return therein, and as the record in said cause, the following papers:

1st. Original bill of complaint.
2nd. Praecipe for subpoena for defendant Mary E. Coffin.
3rd. Subpoena and return of service on defendant Mary E. Coffin.
4th. Appearance of defendants William O'Brien, Albert J. Lammers and George A. Lammers.
5th. Answer of defendants Wm. O'Brien, Geo. A. Lammers and Albert J. Lammers.
6th. Replication.
7th. Stipulation of facts.

8th. Decision directing the restraining and enjoining defendants from removing timber, etc.

9th. Petition of complainant for leave to file supplemental bill.

10th. Stipulation that supplemental bill be filed (omitting bill attached.)

11th. Order granting leave to file supplemental bill.

12th. Supplemental bill.

13th. Answer of defendants Wm. O'Brien, Albert J. Lammers and Geo. A. Lammers to supplemental bill.

14th. Replication of complainant to answer of defendants O'Brien et al to supplemental bill.

15th. Order fixing time to take testimony.

16th. Stipulation that cause be set down for final hearing.

17th. Order setting cause down for final hearing.

18th. Opinion directing entry of decree dismissing bill and supplemental bill.

3 19th. Final decree.

20th. Petition for appeal and allowance thereof

21st. Assignment of errors.

22nd. Bond on appeal.

23rd. Citation and proof of service.

Yours, etc.,

JAMES B. KERR,
Solicitor for Appellant.

Indorsed: Praecipe for Record on Appeal. Filed Feb. 3, 1905, Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy.

That theretofore, to-wit: On the 30th day of December, A. D. 1902, there was filed with said Clerk the Bill of Complaint in said Cause, in the words and figures following, to-wit:

United States Circuit Court for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lamaners, George A. Lammers, and Mary E. Coffin, Defendant.

Bill of Complaint.

To the Honorable the Judges of the United States Circuit Court for the District of Minnesota, in Equity sitting:

Your orator, Northern Lumber Company, a corporation organized and existing under the laws of the State of Wisconsin bring this, its bill of complaint, against William O'Brien, Albert J. Lammers, George A. Lammers, and Mary E.
4 Coffin, and respectfully shows unto your Honors:

I.

That the Northern Pacific Railroad Company is a corporation created, organized and existing under and by virtue of an act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and those certain acts and joint resolutions of congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act of congress said company was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget sound, with a branch via the valley of the Columbia river to a point at or near Portland in the State of Oregon.

II.

That by the third section of said act of July 2, 1864, there was granted to said railroad company

"every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office."

That said railroad company duly accepted the terms,
5 conditions and impositions of said act of congress, and thereafter proceeded with the work of surveying, definitely locating and constructing its said railroad and telegraph line.

III.

And your orator further shows that on the 6th day of July, 1882, the said Northern Pacific Railroad Company duly filed in the office of the commissioner of the general land office, a certain map or plat, duly approved by the secretary of the interior,

showing the line of definite location of that portion of its road extending from Thomson Junction, in the State of Minnesota, eastwardly to Ashland, in the State of Wisconsin.

IV.

And your orator shows that thereafter the said Northern Pacific Railroad Company duly definitely located the whole of its line of railroad extending from a point on Lake Superior, in the State of Wisconsin, westwardly to a point on Puget sound, and thereafter duly constructed and completed its said railroad and telegraph line upon said line of definite location, in all respects as required by the provisions of said act of July 2, 1864.

V.

And your orator further shows that the south half of the south-east quarter (S ½ S E ¼) of section twenty-seven (27), township fifty-two (52) north of range fifteen (15) west of the fourth principal meridian is coterminous with and within twenty miles of that portion of said road from Thomson Junction to Ashland so definitely located as aforesaid. That at the date of the grant to said Northern Pacific Railroad Company, and at the time the line of said railroad coterminous with said land was definitely fixed, as aforesaid, said land was public land of the United States, not reserved, sold, granted, or otherwise
6 appropriated, and was free from pre-emption or other claims or rights, and was non-mineral in character.

VI.

And your orator further shows that by reason of the facts hereinbefore set forth said Northern Pacific Railroad Company became the owner, in fee simple, of the said south half of the southeast quarter (S½ S E¼) of section twenty-seven (27), township fifty-two (52) north, range fifteen (15) west of the fourth principal meridian, Minnesota; and that thereafter, and on October 17, 1883, said company filed in the United States district land office at Duluth, Minnesota, its certain list known as Duluth List No. 9, wherein, among other lands, was listed the land above described, such listing being done for the purpose of bringing said lands formally before the officers of the interior department for examination and patenting to said company.

VII.

And your orator further shows that in the year 1893 the Northern Pacific Railroad Company was insolvent and unable to pay the interest on certain bonds secured by mortgages on its

lands and other property; and thereafter in a certain cause in equity commenced by the creditors of said railroad company for the foreclosure of said mortgages and for the sequestration and distribution of the property of said company for the benefit of the secured and unsecured creditors of said railroad company receivers were appointed by the United States Circuit Court for the district of Minnesota of all the property of said railroad company, including the land hereinbefore described; that said circuit court so appointing said receivers duly authorized and directed them to sell the lands of the Northern Pacific Railroad Company situate in the State of Minnesota, and to make
7 contracts and deeds therefor. And your orator shows that thereafter, to-wit: on the 4th day of November, 1898, Edwin H. McHenry and Frank G. Bigelow, the receivers so appointed and empowered by said Court as aforesaid, sold and conveyed by deed to Frederick Weyerhaeuser and John A. Humbird, the land hereinbefore described; and thereafter said Weyerhaeuser and Humbird, by their deed dated March 4, 1899, conveyed to the complainant, Northern Lumber Company, all the timber standing and growing on the land above described:

And your orator shows that the Northern Lumber Company is a corporation organized and existing under the laws of the State of Wisconsin.

VIII.

And your orator further shows that by an act of congress approved May 5, 1864, there was granted by the United States to the state of Minnesota, for the purpose of aiding in the construction of a railroad in said state from the City of St. Paul to the head of Lake Superior every alternate section of public land of the United States, not mineral, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, within the State of Minnesota; and it was provided in said act that in case it should appear that the United States had, when the line of the road to be constructed under said act was definitely fixed, disposed of any of the lands in said alternate sections, other lands equal in amount to the lands so disposed of should be selected for said company within twenty miles from the line of said road. And for a complete statement of all the terms and provisions of said act of congress, reference is hereby made to said act as the same appears in Volume 13 of the United States Statutes at large, at page 64. That thereafter the grant of lands so made by said act of congress became vested in the Lake Superior and Mississippi Railroad Company, which said company, on May 7,
8 1864, filed in the office of the commissioner of the general land office a map or diagram showing the general route of its said railroad from St. Paul to a point on Lake Superior.

That thereafter, and on May 26, 1864, the commissioner of the general land office transmitted a copy of said map or diagram to the register and receiver of the United States district land office at Duluth, Minnesota, with a letter as follows:

"General Land Office, May 26, 1864.

Register and Receiver,
Duluth, Minnesota.

Gentlemen: By the act approved May 5, 1864, a grant of lands was made to the State of Minnesota, to aid in the construction of a railroad from St. Paul to Lake Superior. The Secretary of the Interior having approved of a withdrawal of lands for said road, you will suspend from pre-emption, settlement and sale, a body of lands about twenty miles in width, as indicated on the inclosed diagram "A", marked 'Lake Superior and Mississippi Railroad.' Acknowledge the date of receipt of this.

Very respectfully, your ob't servant,
J. M. EDMONDS,
Commissioner."

And your orator further shows that said map or diagram so transmitted by the commissioner of the general land office to said register and receiver, as aforesaid, was so vague, uncertain, indefinite and inaccurate that it is impossible for your orator to ascertain or determine whether or not the land hereinbefore described fell within the place or indemnity limits, as shown on said map or diagram; and that the language of the attempted order of withdrawal as contained in said letter of May 26, 1864, is so vague, uncertain and indefinite that your orator can not determine whether or not it was thereby intended to include within such attempted withdrawal the land hereinbefore described.

And your orator shows that said attempted withdrawal of lands by said commissioner of the general land office was wrongful and without authority of law.

9 IX.

And your orator further shows that thereafter, to-wit: on the 25th day of September, 1866, the said Lake Superior and Mississippi Railroad Company filed in the office of the commissioner of the general land office a map showing the definite location of its railroad from St. Paul to Duluth, on Lake Superior. That thereupon the commissioner of the general land office marked and designated upon the plats in his office the ten mile, or place, limits of said grant; the ten-twenty or indemnity, limits of said grant; and also the terminal limits, beyond which said land grant did not extend. And your

orator further shows that the said south half of southeast quarter (S ½ S E¼) of section twenty-seven (27), township fifty-two (52) north, of range fifteen (15) west, Minnesota, is beyond or outside the northeastern terminus of said land grant, and is not within the place, indemnity, or any other limits of said grant.

X.

And your orator further shows that thereafter, in the month of April, 1901, the said list known as Duluth list No. 9 filed by said Northern Pacific Railroad Company in the [Unites] States district land office at Duluth, Minnesota, on October 17, 1883, as hereinbefore set forth, came before the commissioner of the general land office for examination and approval for patenting the lands to said company, but said commissioner, acting under a mistake of law, by his decision of April 6, 1901, refused to approve said list, and rejected the same, for the reason, as stated by him, that the lands therein described were reserved for the said Lake Superior and Mississippi Railroad Company at the date of the grant to said Northern Pacific Railroad Company, and were therefore excepted from the grant to said last named company. That from said decision by the commissioner of the general land office the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, appealed to the secretary of the interior, and the secretary of the interior, with all the facts before him, acting under a mistake of law, refused to approve said list, but rejected the same, and rendered a decision, under date of July 16, 1901, in the words and figures following, to-wit:

"The Northern Pacific Railway Company, successor in interest of the Northern Pacific Railroad Company, has appealed from your office decision of April 6, last, wherein it was held that certain described lands in the Duluth land District, Minnesota, and within the primary limits of the grant made by the act of July 2, 1864, (13 Stat., 365), in aid of the construction of the Northern Pacific railroad, were excepted from the operation of said grant because they were, at the date of the passage of said act, within ten miles of the probable route of the Lake Superior and Mississippi railroad, in aid of the construction of which a grant was made by the act of May 5, 1864 (13 Stat., 64), and were embraced within the withdrawal of May 26, 1864, made on account of the said last mentioned grant.

Upon the adjustment of the limits of the grant made by the act of May 5, 1864, supra, to the line of definite location of the Lake Superior and Mississippi railroad, effected September

25, 1866, by the filing and approval of the required map, the lands here in question were found to fall without said limits and were thereupon freed from said grant. The Northern Pacific Railroad was not definitely located opposite these lands until July 6, 1882, at which date they were free from adverse claim so far as shown by the record now before this Department.

The appeal filed on behalf of the railway company is based upon the ground that the withdrawal of May 26, 1864, being a withdrawal upon a map of probable or general route, did not prevent congress from granting the lands so withdrawn in aid of the construction of the Northern Pacific railroad, and that they were included in the grant to that company made by the act of July 2, 1864, because falling without the limits of the grant made by the act of May 5, 1864, as established by the definite location of the Lake Superior and Mississippi railroad, no right ever attached to them under the earlier grant. The decision of the Court in the case of United States v. Oregon and California R. R. Co. (176 U. S., 28), is relied upon to sustain this claim.

In the case of Bardon v. Northern Pacific Railroad Co. (145 U. S., 535), one Robinson had settled upon a portion of an odd numbered section within the limits of the grant made by the act of July 2, 1864, for which he filed a pre-emption declaratory statement of September 21, 1853. He died without
11 making proof and payment under said filing, and on July 30, 1857, his heirs made payment for the land and certificate of purchase issued thereon. On August 5, 1863, said certificate and pre-emption filing were cancelled. In holding that said land was excepted from the operation of the grant here in question, it was said by the Court:

It is thus seen that when the grant to the Northern Pacific Railroad Company was made, on the 2nd day of July, 1864, the premises in controversy had been taken up on the pre-emption claim of Robinson, and that the pre-emption entry made was uncanceled; that by such pre-emption entry the land was not at the time a part of the public lands; and that no interest therein passed to that company. The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All lands, to which any claims or rights of others have attached, do not fall within the designation of public land. The statute also says that whenever, prior to the definite location of the route of the road, and of course prior to the grant made, any of the lands which would otherwise fall within it have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise dis-

posed of, other lands are to be selected in lieu thereof under the direction of the Secretary of the Interior. There would therefore be no question that the pre-emption entry by the heirs of Robinson, the payment of the sums due to the government having been made, as the law allowed, by them after his death, took the land from the operation of the subsequent grant to the Northern Pacific Railroad Company, if the pre-emption entry had not been subsequently canceled. But such cancellation had not been made when the act of congress granting land to the Northern Pacific Railroad Company was passed; it was made more than a year afterwards. As the land pre-empted then stood on the records of the land department, it was severed from the mass of the public lands, and the subsequent cancellation of the pre-emption entry did not restore it to the public domain so as to bring it under the operation of previous legislation, which applied at the time to land then public. The cancellation only brought it within the category of public land in reference to future legislation. This, as we think, has long been the settled doctrine of this Court. See also Northern Pacific Railroad Co. v. De Lacey (174 U. S. 622, 626).

Applying this ruling to the lands now in question, they were at the time of the grant to the Northern Pacific Railroad Company included within an existing and lawful withdrawal made in aid of a prior grant and were therefore not subject to sale or other disposition under general laws: They were not 'public lands' within the accepted meaning
12 of those words (Barker v. Harvey, 181 U. S., 481, 490) and were not within the terms of the grant to the Northern Pacific Railroad Company, which was of every alternate section of public land.'

While the decision in the case of United States v. Oregon and California Railroad Company, cited by appellant, gives color to appellant's contention, it must be remembered that in that case the lands in controversy were not reserved under the prior grant or at all until after the date of the later grant under which they were held to have passed. They were public lands at the time of the later grant which was held to have embraced them. The case of Bardon v. Northern Pacific R. R. Co., supra, and kindred cases, were not referred to in the opinion of the court, and it cannot be presumed that by any general discussion upon an immaterial point the court intended to overrule the Bardon and kindred cases.

That a right under the prior grant did not eventually attach to the lands here in question is immaterial, first, because the act of July 2, 1864, was a grant in praesenti, and second, be-

cause a reservation on account of a prior grant will defeat a later grant like that of July 2, 1864, whether the lands are needed in satisfaction of the prior grant or not. Northern Pacific R. R. Co. v. Musser-Sauntry Co. (168 U. S., 604).

Your office decision is accordingly affirmed."

And your orator shows that in pursuance of said decision by the secretary of the interior, the commissioner of the general land office formally and finally canceled said Duluth list No. 9.

XI.

And your orator further shows that thereafter, to-wit: On October 2, 1901, one Mary E. Coffin applied at the United States district land office at Duluth, Minnesota, to select the south half of the southeast quarter (S ½ S E¼) of section twenty-seven (27), township fifty-two (52) north, range fifteen (15) west, under the provisions of the act of Congress approved June 4, 1897, which said act provides that persons owning lands within the limits of certain forest reservations may relinquish such lands to the United States and select other lands in lieu thereof. That the selection so made by said Mary E. Coffin, as aforesaid, was wrongfully and unlawfully accepted by the register and receiver of said land office, and was by
13 them transmitted to the commissioner of the general land office for his examination and approval for patenting to said Mary E. Coffin, and that said selection is now pending before said Commissioner of the general land office awaiting such examination and approval.

XII.

And your orator shows that the selection so made by said Mary E. Coffin was accepted by the said register and receiver and will be accepted and approved by the commissioner of the general land office under a mistake of law founded upon the erroneous decision of the secretary of the interior hereinbefore set forth. That the accuracy of said decision, that is to say the question of whether or not the attempted reservation by the commissioner of the general land office of the lands coterminous with the line of general route of the said Lake Superior and Mississippi railroad operated to except said lands from the grant to the Northern Pacific Railroad Company, is the only question of law or fact at issue between your orator and the defendants herein.

XIII.

And your orator shows that the defendants herein, William O'Brien, Albert J. Lammers and George A. Lammers, claim

some right, title and interest in the land above described, or in the timber thereon, under and through said Mary E. Coffin.

XIV.

And your orator further shows that the said defendants, William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, claim that the said land hereinbefore described, and all thereof, was excepted from said grant to said Northern Pacific Railroad Company by reason of said
14 alleged withdrawal for the benefit of said Lake Superior and Mississippi Railroad Company, and that by reason thereof, and by reason of the facts hereinbefore stated, the same was subject to selection and location by said Mary E. Coffin, as hereinbefore set forth.

XV.

And your orator shows that the principal value of said land consists in the timber standing thereon, and that the value of said timber so standing thereon, exclusive of the land, exceeds the sum of two thousand dollars.

XVI.

And your orator shows that said land hereinbefore described is vacant and unoccupied.

XVII.

And your orator shows that the defendants herein threaten and intend, and will, unless restrained by the order of this honorable court, enter upon the above described land and cut and remove the timber therefrom and will entirely despoil said land of the timber thereon, and will thereby greatly impair and destroy the value of your orator's interest in said land and the timber standing thereon and so commit irreparable injury thereto and to your orator's interest therein.

For as much as your orator can have no adequate relief except in this court, and to the end that it may obtain the relief to which it is justly entitled in the premises, your orator now prays the court to grant to it a writ of subpoena of the United States, directed to the said defendants William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, requiring and commanding them to appear herein and answer, but not under oath, (an answer under oath being hereby expressly waived) the several allegations in this
15 your orator's bill contained.

And your orator further prays that your Honors may grant a writ of injunction issuing out of and under the seal

of this honorable court, perpetually enjoining and restraining the said defendants, William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, their agents, contractors, servants, workmen and employes from cutting or removing any trees or timber from the said south half of the southeast quarter (S ½ S.E. ¼) of section twenty-seven (27), township fifty-two (52) north, range fifteen (15) west, Minnesota.

And your orator prays that a provisional or preliminary injunction may be issued restraining the said defendants, their agents, contractors, servants, workmen and employes from cutting or removing any trees or timber from said land during the pendency of this cause.

JAMES B. KERR,
M. T. SANDERS,
Solicitors for Complainant.

State of Minnesota,
County of Ramsey—ss.

R. M. Weyerhaeuser, being first duly sworn, deposes and says: That he is an officer and agent of the above named complainant, to-wit: its manager; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true.

R. M. WEYERHAEUSER.

Subscribed and sworn to before me, this 26th day of December, 1902.

[Notarial Seal, Ramsey Co. Minn.]

P. HENDRICKSON,
Notary Public,
Ramsey County, Minnesota.

16 Indorsed: Bill of Complaint. Filed December 30th, 1902, Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

That further on the same day, to-wit: on the 30th day of December, A. D. 1902, there was filed with said Clerk A Praecipe for a Chancery Subpoena in said Cause, in the words and figures following, to-wit:

United States Circuit Court, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers, and Mary E. Coffin, Defendants.

Praecipe for Chancery Subpoena.

To the Clerk of the above named Court:

Please issue chancery subpoena in the above entitled cause, together with a copy for service on the defendant, Mary E. Coffin, and deliver the same to the marshall for service.

JAMES B. KERR,
M. T. SANDERS,
Solicitors for Complainants.

Indorsed: Praecipe for Subpoena. Filed December 30th, 1902, Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

17 That still further on the same day, to-wit: On the 30th day of December, A. D. 1902, A Chancery Subpoena to Mary E. Coffin was issued by said Clerk and delivered to the United States Marshal, said District, for service; And that thereafter, to-wit: on the 6th day of January, A. D. 1903, said subpoena was returned into Court by said Marshal with his return of service attached thereto, and filed by said Clerk; which said Subpoena and Return are, in words and figures, as follows, to-wit:

United States of America, District of Minnesota, Fifth Division.

The President of the United States of America to Mary E. Coffin—Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the Clerk of the Circuit Court of the United States, for the District of Minnesota, on the first Monday of February next, at the City of Duluth, then and there to answer the Bill of Complaint of Northern Lumber Company, A Corporation, and a citizen—of the State of Wisconsin, filed against you on the 30th day of December, A. D. 1902, hence fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 30th day of December, 1902.

Issued at my office in the City of Duluth, under the seal of said Circuit Court, the day and year last aforesaid.

[Seal of said Court] HENRY D. LANG, Clerk.
By Thos. H. Pressnell, Deputy.

18 Memorandum: The above named defendant to enter her appearance in this suit in the Clerk's office aforesaid, on or before the day at which this writ is returnable; otherwise the bill may be taken pro confesso.

HENRY D. LANG, Clerk.
By Thos. H. Pressnell, Deputy.

James B. Kerr and
M. T. Sanders,
Complainant's Solicitors.

Return on Service of Writ.

United States of America,
District of Minnesota—ss.

I hereby certify and return that I served the annexed Chancery Subpoena on the therein-named Mary E. Coffin by handing to and leaving a true and correct copy thereof with her personally at Duluth in said District on the 3d day of January, A. D. 1903.

WM. H. GRIMSHAW,
U. S. Marshal.
By Geo. J. Mallory, Deputy.

Indorsed: Chancery Subpoena. Returned into the Clerk's office and filed, January 6, 1903. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy.

That theretofore, to-wit: On the 31st day of December, A. D. 1902, there was filed with said Clerk an appearance by defendants William O'Brien, A. J. Lammers and Geo. A. Lammers, in said cause, in the words and figures following, to-wit:

Circuit Court of the United States, District of Minnesota, Fifth Division.

Northern Lumber Company, Complainant,
vs.
Wm. O'Brien, A. J. Lammers, Geo. A. Lammers and Mary E. Coffin, Defendants.

Appearance.

The Clerk will enter my appearance for the defendants Wm. O'Brien, A. J. Lammers and Geo. A. Lammers.

J. N. SEARLES,
Solicitor for Wm. O'Brien, A. J. Lammers & Geo. A. Lammers, Dfts.

19 Indorsed: Appearance by defendants, Wm. O'Brien, A. J. Lammers & Geo. A. Lammers, by J. N. Searles, Solicitor. Filed Dec. 31, 1902. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy.

That on the 2nd day of February, A. D. 1903, there was filed with said Clerk the answer of defendants Wm. O'Brien, A. J. Lammers and Geo. A. Lammers in said cause, in the words and figures following, to-wit:

United States Circuit Court, District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

(Answer.)

Now come William O'Brien, Albert J. Lammers and George A. Lammers, defendants above named, and answering the Bill of Complaint of the above named complainant, allege as follows:

1. These defendants admit the incorporation of the Northern Pacific Railroad Company as alleged in Sec. 1 of said Bill of Complaint.

2. These defendants admit that the said railroad company was granted, by the Act of Congress under which it was organized, certain lands, and allege that such grant was contained in the Third section of said Act, being the "Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the northern route", approved July 2, 1864—and, so far as material to this controversy was in words following:

"Sec. 3. That there be, and hereby is, granted to the "Northern Pacific Railroad Company,——every alternate sec- "tion of public land, not mineral, designated by odd numbers, "to the amount of twenty alternate sections per mile on each "side of said railroad line, as said company may adopt, through "the territories of the United States, and ten alternate sec- "tions of land per mile on each side of said railroad, whenever "it passes through any States, and whenever, on the line thereof, "the United States have full title, not reserved, sold, granted, "or otherwise appropriated and free from pre-emption, or other "claim or rights, at the time the line of said road is definitely "fixed, and a plat thereof filed in the office of the Commission "of the General Land Office; and whenever, prior to said time, "any of said sections, or parts of sections, shall have been "granted, sold, reserved, occupied by homestead settlers, or "pre-empted or otherwise disposed of, other lands shall be se- "lected by said company in lieu thereof, under the direction of "the Secretary of the Interior, in alternate sections, and desig-

"nated by odd numbers, not more than ten miles beyond the "limits of said alternate sections, provided, that if said route "shall be found upon the line of any other railroad route, to aid "in the construction of which lands have been heretofore granted "by the United States, as far as the routes are upon the same "general line the amount of land heretofore granted shall be "deducted from the amount granted by this Act"; and these defendants admit that said railroad company duly accepted the provisions of said act.

3. These defendants admit the facts alleged in Sections III and IV of the Bill of Complaint herein.

4. These defendants do not know and can not set forth as to their belief or otherwise whether the south half of the south-east quarter of Section Twenty-seven (27) Township Fifty-two (52) north, of Range Fifteen (15) west of the Fourth Principal Meridian is coterminus with and within twenty miles of that portion of said road from Thompson Junction to Ashland as definitely located; but these defendants deny that at the date of the aforesaid grant to said Northern Pacific Railroad Company, or at the time of definitely fixing the line of said road between Thompson Junction and Ashland, as aforesaid, the said land was public land of the United States not reserved or otherwise appropriated and free from other claim, and aver
21 that said land at both said periods were reserved and appropriated by the United States as hereinafter set forth to protect and secure a former grant by the United States made to the State of Minnesota for the benefit of the Lake Superior & Mississippi Railroad Company, as in the bill of complaint herein mentioned.

5. These defendants deny that by reason of any facts in said Bill of Complaint alleged, or otherwise, said Northern Pacific Railroad Company ever became the owner in fee simple, or of any interest or estate in the aforesaid tract or real property; and as to whether said company ever filed its list known as Duluth List No. 9, and if so for what purpose, or whether it included the aforesaid land these defendants do not know and can not set forth as to their belief or otherwise; and defendants have no knowledge, or information as to the various matters set forth in Section VII of the Bill of Complaint herein and therefore deny the same and each and all of the same, except that defendants admit the incorporation of complainant as therein alleged.

6. The defendants admit the passage by Congress and approval of an Act granting lands to the State of Minnesota for the purpose and as alleged in Section VIII of the Bill of Com-

plaint herein,—being the same set forth in full in Vol. 13 U. S. Statutes at Large, p. 64,—and admit that such grant became vested in the Lake Superior & Mississippi Railroad Company and that on the 7th day of May, 1864, said last named company filed in the office of the Commissioner of the General Land Office a map or diagram showing the general route of its railroad from St. Paul to a point on Lake Superior.

In and by said Act so granting lands to the State of Minnesota it was, among other things, provided that in case it should appear that the United States have when the line or route of said road is definitely fixed, sold, appropriated, reserved, or otherwise disposed of any sections, or any part thereof,
22 granted, as aforesaid, or that the right of pre-emption or homestead settlement had attached to the same then it should be the duty of the Secretary of the Interior to select other lands specified in lieu thereof, as more fully set forth in said Act, to which reference is made for a more full statement thereof.

These defendants admit that the Commissioner of the General Land Office under date of May 26th, 1864, transmitted to the Register and Receiver of the Land Office at Duluth, Minnesota, in which district said land was situate, a certain letter as set forth in said Bill of Complaint, but whether the "diagram A, marked Lake Superior and Mississippi Railroad" in said letter referred to as a part thereof was merely a copy of the map previously filed with said Commissioner by said Lake Superior & Mississippi Railroad Company, or that and more these defendants are not now able to say, for want of sufficient information to form a belief, and, consequently these defendants deny that said diagram so accompanying said letter of the commissioner was a mere copy of the aforesaid map of general location of the road of said Lake Superior & Mississippi Railroad Company.

These defendants aver that said letter of the Commissioner was duly received by said Register and Receiver by due course of mail and that the same with the accompanying map or diagram therein referred to as a part thereof clearly designated a tract of land twenty (20) miles in width lying on both sides of the aforesaid general location of the track or road of said Lake Superior & Mississippi Railroad and included the land in the Bill of Complaint referred to, and by said letter of instructions to said Register and Receiver and other proceedings by the proper authorities in the Department of the Interior the land in the said Bill of Complaint described became on said
23 May 26th, 1864, and ever after remained until the filing of map of definite location of the road of said Lake Superior & Mississippi Railroad on the 25th of September, 1886,

a full legal, distinct and valid withdrawal of said lands, including the land in controversy herein, from the mass of public lands afterwards referred to in the aforesaid Act granting lands to said Northern Pacific Railroad Company; and by reason of said withdrawal said land here in controversy never became subject to said grant to said Northern Pacific Railroad Company, and no interest therein ever passed under said last mentioned grant to this plaintiff, or any of its predecessors in interest or claim.

7. These defendants admit the allegations of facts contained in Section IX of the Bill of Complaint herein.

8. These defendants admit the several allegations of fact set forth in Sec. X of the Bill of Complaint herein, except that they do not know and can not set forth as to their belief or otherwise whether said "Duluth List No. 9" included the lands in controversy, and also except as to the alleged mistake of law made by the Commissioner of the General Land Office and the Secretary of the Interior, and in that regard defendants aver that no mistake of law was made by either of said officers in their said determinations, on the contrary both said determinations were in accordance with the law and facts governing the same; and defendants aver that such determinations were each made on an assumption of facts agreed upon by both this complainant and those under whom it claims herein as well as the said Commissioner and Secretary of the Interior, among which facts so assumed and agreed upon was the fact that the lands in question had been withdrawn for the benefit of the grant to the State of Minnesota hereinbefore referred to by the proceedings therefor, and that such proceedings were valid and effectual therefor, unless the subsequent grant to the Northern Pacific Railroad Company, hereinbefore referred to,
24 embraced as a matter of law, such land, regardless of their withdrawal as a matter of fact.

And these defendants aver that the Land Department of the United States has not, in the aforesaid proceedings, or others determined or ever been called upon to determine whether the proceedings for withdrawal of the land in question for the benefit of the aforesaid grant to the State of Minnesota were sufficiently definite and certain to accomplish that object, or whether—as alleged in Section VIII of the Bill of Complaint herein—the "map or diagram so transmitted by the Commissioner of the General Land Office to said Register and Receiver, was so vague, uncertain, indefinite and inaccurate that it is impossible for your orator (or any one) to determine whether or not the land hereinbefore described fell within the place or indemnity limits, as shown on said map or diagram; or that the

language of the attempted order of withdrawal as contained in said letter of May 26th, 1864, is so vague, uncertain and indefinite that your orator (or others) can not determine whether or not it was thereby intended to include within such attempted withdrawal the land hereinbefore described"; and defendants further aver that the sufficiency in point of fact or law of the said withdrawal proceedings is now first called in question, and the Commissioner of the General Land Office, nor the Secretary of the Interior have never determined or been called upon to determine the sufficiency of said withdrawal proceedings in point of fact or law, to take the land in question out of the grant to the Northern Pacific Railroad Company, except as aforesaid, for which reason defendants aver that this Court has no jurisdiction to determine this controversy.

9. These defendants admit the facts alleged in Sec. IX of the Bill of Complaint herein.

10. These defendants aver that they do not know and can not set forth their belief as to whether the facts alleged in Sec. X of the Bill of Complaint herein are true, except that they are informed and believe and on such information and belief admit that the Commissioner of the General Land Office and the Secretary of the Interior refused to approve Duluth List No. 9, for the reasons set forth in the decision of the Secretary of the Interior set forth in the Bill of Complaint herein in Sec. X aforesaid, and defendants aver that the land in controversy were in fact reserved for the Lake Superior & Mississippi Railroad Company at the date of the grant to the Northern Pacific Railroad Company and therefore excepted from the grant to the said last named company.

11. Further answering these defendants aver that Mary E. Coffin did apply at the United States Land Office at Duluth, Minn. on Oct. 2, 1901 to select the land in controversy herein under the provisions of the act of Congress approved June 4, 1897 as in Sec. XI of the Bill of Complaint herein, and her said application was accepted by the officers at said land office and the same duly remitted for further action to the General Land Office at Washington, D. C., and such application now remains in the General Land Office at Washington, D. C. for action and undetermined; and defendants aver that said Mary E. Coffin claims that she is entitled to have her said selection and application granted and allowed, but the same has not as yet been acted upon by the said Commissioner.

12. Afterwards and on the 25th of October, 1901 said Mary E. Coffin and Herbert W. her husband duly conveyed all her interest in the lands in question, by deed of special warranty, to

Ernest W. Jones, and Ben F. Gilbert, and the latter afterwards, to-wit, on the 25th day of October, 1901 duly conveyed to these defendants, for a valuable consideration actually paid the right to enter in and upon said lands and remove all the timber standing or being thereon any time within five years from date of said conveyance; and these defendants purchased said timber and took said conveyance in good faith, for full value actually paid at the time of such conveyance to them, without any notice or knowledge of the claim of this plaintiff or its grantor to any interest or estate in the said timber or the lands on which it is situate.

26

13. These defendants admit that the value of the timber standing and being on the aforesaid land exceeds two thousand dollars.

14. Whether the aforesaid selection by said Mary E. Coffin of the land in controversy will be approved by the Commissioner of the General Land Office, or the Secretary of the Interior these defendants have no knowledge or information sufficient to form a belief and leave the complainant to make such proof thereof as it may be advised; but these defendants aver that the determination of the proper officer of the Land Department of the aforesaid application of said Mary E. Coffin involves, inter alia, a determination of what was done, as a matter of fact, by the Lake Superior & Mississippi Railroad Company and the Commissioner of the General Land Office as well as the Secretary of the Interior, in the matter of a withdrawal of the land in controversy from sale or other disposition by the United States at the time and prior to the grant to the Northern Pacific Railroad Company aforesaid, and such issue of fact, as these defendants are informed, believe and aver, has never been determined by the said Commissioner or Secretary, nor have they ever been called upon by complainant or others to determine what were the facts in that regard, and the determination of said officers referred to in Sec. X of the Bill of Complaint herein was confined solely to a determination of the legal effect of a legal withdrawal of the lands in controversy for the benefit of the grant to the Lake Superior & Mississippi Railroad Company—through the State of Minnesota, as trustee—assuming that such withdrawal was made, and these defendants claim, among other matters in this cause, that said land was legally withdrawn from and not included in the said grant to the Northern Pacific Railroad Company, under which this complainant deraigns title, if at all.

27

15. These defendants admit that the land in controversy is vacant and unoccupied, and that they claim the right to enter

upon the same and remove the timber therefrom as authorized by the aforesaid permit granting to them as hereinbefore set forth.

16. These defendants further allege, on information and belief that neither the Northern Pacific Railroad Company, nor any of its successors in interest or claim to the title, legal or equitable to the property in controversy, including this complainant, have paid or tendered to the United States the cost of surveying, selecting and conveying the land in controversy, as required by the proviso to the Act of Congress, approved July 31, 1876—being Statutes at Large, p. 121—making appropriation for sundry civil expenses of the Government, etc., which declares,—

"That before any lands granted to any railroad company "by the United States shall be conveyed to such company, or "any persons entitled thereto under any acts incorporating or "relating to said company, unless such company is exempt by "law from the payment of such costs, there shall first be paid "into the Treasury of the United States the cost of surveying, "selecting and conveying the same by the said company or per-"sons in interest."

17. These defendants further aver that they have full, true and direct answer made to all and singular the matters contained in the Bill of Complaint herein, so far as they have any knowledge or information thereof.

Wherefore These defendants pray that it be adjudged
28 and decreed that complainant have no right, title or interest in or to any of the lands or timber thereon in controversy in this cause, and for such other and further relief as in equity may seem just and proper together with their reasonable costs and charges herein..

J. N. SEARLES,

Solicitor and Counsellor for the defendants William O'Brien, Albert J. Lammers and George A. Lammers.

State of Minnesota,
County of Washington—ss.

Geo. A. Lammers, being first duly sworn upon oath says that he is one of the defendants in the foregoing within entitled action; that the foregoing answer is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

GEORGE A. LAMMERS.

Subscribed and sworn to before me this 31st day of January, 1903.

[Notarial Seal Washington Co. Minn.]

J. N. SEARLES,
Notary Public,
Washington County, Minn.

Indorsed: Answer. Filed February 2nd, 1903. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy.

That thereafter, to-wit: On the 2nd day of March, A. D. 1903, there was filed with said Clerk the Replication in said cause, in the words and figures following, to-wit:

Circuit Court of the United States, For the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Replication of Northern Lumber Company.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefits and advantages of exception which may be had and taken to the manifold insufficiencies of the said answer, for replication thereto says that it will aver, maintain and prove its bill of complaint to be true, certain and sufficient in the law to be answered unto; and that said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by repliant without this; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the repliant is and will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

JAMES B. KERR,
Solicitor for Complainant.

Indorsed: Replication. Filed March 2, 1903. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

That thereafter, to-wit: On the 19th day of August, A. D. 1903, there was filed with said Clerk a Stipulation of facts in said cause, in the words and figures following, to-wit:

30 United States Circuit Court for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers, and Mary E. Coffin, Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that for the purpose of the trial of this cause the following facts may be taken to be true.

I.

That the Northern Pacific Railroad Company is a corporation created, organized and existing under and by virtue of an act of congress approved July 2, 1864, entitled: "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and those certain acts and joint resolutions of congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act of congress said company was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget sound, with a branch via the
31 Valley of the Columbia river to a point at or near Portland in the state of Oregon.

II.

That by the third section of said act of July 2, 1864, there was granted to said railroad company

"every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other

claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office." And the whole of said third section is hereby referred to and made a part of this stipulation.

That said railroad company duly accepted the terms, conditions and impositions of said act of congress, and thereafter proceeded with the work of surveying, definitely locating and constructing its said railroad and telegraph line.

III.

That on the 6th day of July, 1882 the said Northern Pacific Railroad Company duly filed in the office of the commissioner of the general land office, a certain map or plat, duly approved by the secretary of the interior, showing the line of definite location of that portion of its road extending from Thomson Junction in the State of Minnesota, eastwardly to Ashland in the State of Wisconsin.

IV.

That thereafter the said Northern Pacific Railroad Company duly definitely located the whole of its line of railroad extending from a point on Lake Superior in the state of Wisconsin, westwardly to a point on Puget sound, and thereafter duly constructed and completed its said railroad and telegraph line upon said line of definite location, in all respects as re-
32 quired by the provision of said act of congress of July 2, 1864.

V.

That the south half of southeast (S ½ S. E. ¼) of section twenty-seven (27), township fifty-two (52) north, of range fifteen (15) west of the fourth principal meridian, is co-terminous with and within twenty (20) miles of that portion of said road from Thomson Junction to Ashland so definitely located as aforesaid; that at the time the line of said railroad co-terminous with said land was definitely fixed as aforesaid said land was public land of the United States not reserved, sold, granted or otherwise appropriated, and was free from pre-emption or other claims or rights, and was non-mineral in character, and at the date of the grant to said Northern Pacific Railroad Company said land was public land of the United States and subject to said grant, unless the withdrawal for the benefit of the Lake Superior & Mississippi Railroad Company, as hereinafter set forth, operated to take said land out of the category of public lands at the time of the grant to the Northern Pacific Railroad Company.

VI.

That thereafter and on October 17, 1883, said company filed in the United States district land office at Duluth, Minnesota, its certain list known as Duluth List No. 9, wherein, among other lands, was listed the land above described, said listing being done for the purpose of bringing said lands formally before the officers of the interior department for examination and patenting to said company.

At the time of filing of said list No. 9 the said company paid the selection fees required by law and the regulations of the interior department, and thereafter, in the year
33 1888, said company paid the fees required by law for the surveying of said premises above described.

VII.

That in the year 1893 the Northern Pacific Railroad Company was insolvent and unable to pay the interest on certain bonds secured by mortgages on its lands and other property; and thereafter in a certain cause in equity commenced by the creditors of said railroad company for the foreclosure of said mortgages and for the sequestration and distribution of the property of said company for the benefit of the secured and unsecured creditors of said railroad company, receivers were appointed by the United States circuit court for the district of Minnesota of all the property of said railroad company, including the land hereinbefore described; that said circuit court so appointing said receivers duly authorized and directed them to sell the lands of the Northern Pacific Railroad Company situate in the State of Minnesota, and to make contracts and deeds therefor.

That thereafter, to-wit: on the 4th day of November, 1898, Edwin H. McHenry and Frank G. Bigelow, the receivers so appointed and empowered by said court as aforesaid, sold and conveyed by deed to Frederick Weyerhaeuser and John A. Humbird, all the right, title and interest of the Northern Pacific Railroad Company in and to the land hereinbefore described; and thereafter said Weyerhaeuser and Humbird, by their deed dated March 4, 1899, conveyed all their interest and estate thus acquired to the complainant, Northern Lumber Company, in all the timber standing and growing on the land above described.

That the Northern Lumber Company is a corporation organized and existing under the laws of the state of Wisconsin.

VIII.

That by an act of congress approved May 5, 1864
34 there was granted by the United States to the state of Minnesota, for the purpose of aiding in the construction of a railroad in said state from the city of St. Paul to the head of Lake Superior, every alternate section of public land of the United States, not mineral, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, within the State of Minnesota; and it was provided in said act that in case it should appear that the United States had, when the line of the road to be constructed under said act was definitely fixed, disposed of any of the lands in said alternate sections, other lands equal in amount to the lands so disposed of should be selected for said company within twenty miles from the line of said road. And for a complete statement of all the terms and provisions of said act of congress, reference is hereby made to said act as the same appears in volume thirteen (13) of the United States Statute at Large, at page 64. That thereafter the grant of lands so made by said act of congress became vested in the Lake Superior and Mississippi Railroad Company, which said company on May 7, 1864 filed in the office of the commissioner of the general land office map or diagram showing the general route of its said railroad from St. Paul to a point on Lake Superior.

That thereafter, and on May 26th, 1864, the commissioner of the general land office transmitted a copy of said map or diagram to the register and receiver of the United States district land office at Duluth, Minnesota, with a letter as follows:

"General Land Office,
May 26, 1864.

Register & Receiver,
Duluth, Minnesota.

Gentlemen: By the act approved May 5th, 1864, a grant of lands was made to the state of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior.

The Secretary of the Interior having approved of a
35 withdrawal of lands for said road, you will suspend from pre-emption, settlement and sale, a body of lands about twenty miles in width, as indicated on the inclosed diagram "A", marked 'Lake Superior and Mississippi Railroad.' Acknowledge the date of receipt of this.

Very respectfully, your ob't servant,

J. M. EDMONDS, Commissioner."

The "Exhibit A" hereunto attached is a true and correct copy of said map or diagram so filed by said Lake Superior and Mississippi Railroad Company on May 7, 1864, as aforesaid, a copy of which was transmitted by the commissioner of the general land office to the register and receiver of the United States district land office at Duluth, Minnesota, as hereinbefore set forth.

That the lands hereinbefore described lie co-terminous with and within ten miles of said line of general route, as defined by Exhibit "A"

That said letter of May 26th, 1864, so transmitted as aforesaid, was received by the local land officers at Duluth, Minnesota, by due course of mail and prior to July 2, 1864.

IX.

That thereafter, to-wit: on the 25th day of September, 1866, the said Lake Superior and Mississippi Railroad Company filed in the office of the commissioner of the general land office a map showing the definite location of its railroad from St. Paul to Duluth, on Lake Superior. That thereupon the commissioner of the general land office marked and designated upon the plats in his office the ten mile, or place, limits of said grant; the ten-twenty, or indemnity, limits of said grant; and also the terminal limits, beyond which said land grant did not extend.

That thereafter, and on November 2, 1866, the commissioner of the general land office transmitted a letter to the register and receiver of the United States district land office at
36 Duluth, Minnesota, in words and figures following, to-wit:

"Department of the Interior,
General Land Office,
Nov. 2, 1866.

Register and Receiver,
Duluth, Minn.

Gentlemen: Herewith is a diagram showing the line of route, as definitely located, of the Lake Superior and Mississippi Railroad, with the ten, twenty, and on the west side the thirty mile limits indicated thereon, Acts May 5, 1864, & July 13, 1866.

924 The odd sections within all three of these limits will be withdrawn from sale or location, pre-emption or homestead; except in so far as valid pre-emption claims may have accrued to the same, prior to the withdrawal of May 26, 1864, within the limits therein designated and prior to the receipt of this order outside of the limits fixed in that withdrawal.

As the Act of 1864 reserves from the grant any and all lands theretofore reserved, for the purpose of aiding in any object of internal improvement or for any other purposes whatsoever no reserved lands are subject to the operation of the grant.

You will mark the line of route with the several limits on the township plats in pencil, and you will report the fact of it having been done.

The railroad company will be required, first, to make their selections from the 10 and 20 mile limits, if it is then found that a deficiency exists, the same can be made up by selections from the 30 mile limit.

This order will take effect from the date of its receipt at your office & you will advise me of the precise time it may be received by you.

Very respectfully, Your Obt. Servant,

JOS. S. WILSON, Commissioner.

The even sections within the ten mile limits are increased in price to $2.50 per acre and will be subject at that rate to settlement and entry under the pre-emption & homestead laws; but no such sections can be entered at private sale until they shall have first been offered at public auction.

JOS. W. WILSON, Commissioner.

That the said south half of the southeast quarter (S ½ S.E. ¼) of section twenty-seven (27), township fifty-two (52) north, of range fifteen (15) west, Minnesota, is beyond or outside the northeastern terminus of said land grant, and is not within the place, indemnity, or any other limits of said grant, as shown by said map of definite location.

X.

That thereafter, and on the 19th day of March 1901,
37 the secretary of the interior transmitted to the commissioner of the general land office a letter in words and figures following, to-wit:

"Department of the Interior,
Washington. March 19, 1901.

The Commissioner of the
General Land Office.

Sir: The Department is in receipt of your office letter of February 14th last, requesting instructions as to the extent of the withdrawal ordered upon the map of probable route of the Lake Superior and Mississippi Railroad. This inquiry is made because of the decision of this Department in the case of Northern Pacific R. R. Co. v. Rooney (30 L. D. 403), wherein it was held that lands reserved on account of a grant made prior to the

grant of July 2, 1864 (13 Stat., 356), to the Northern Pacific Railroad Company, and continued in reservation until after the definite location of the line of the Northern Pacific road, are excepted from the Northern Pacific grant, but do not afford a basis for the selection of lands within the second indemnity belt of that grant, provision for which is made by the joint resolution of May 31, 1870 (16 Stat., 378).

It appears that on May 7, 1864, two days after the passage of the act of May 5, 1864 (13 Stat., 64), making a grant to aid in the construction of the Lake Superior and Mississippi Railroad, there was filed in your office by the Lake Superior and Mississippi Railroad Company a map of the probable route of its line of road, the same being accompanied by a request for a withdrawal of "the lands within the limits prescribed by said act of congress." The act provides for place limits of ten miles on each side of the line of road, and for indemnity limits of the next ten miles on each side thereof. On the same day your office submitted to the Secretary of the Interior the question whether the withdrawal, if made, should be of lands "within the ten mile limits only, or within both lim-
669 its." By letter of May 23rd, 1864, the delegation in Congress from Minnesota requested the Secretary of the Interior to direct a withdrawal of "lands along the probable line of said railroad for twenty sections in width." The Secretary of the Interior, by letter of May 26th, 1864, ordered your office to make a withdrawal of "A body of lands about twenty miles in width along the probable route of railroad, 'from St. Paul to Lake Superior' as indicated on the diagram submitted by your office." So far as can now be ascertained, the "diagram" referred to by the Secretary of the Interior is the map of probable route filed by said Company May 7, 1864. No other diagram is specifically mentioned in any of said letters, or found among the files. May 26, 1864, your office in a letter to the local office made a withdrawal of "a body of lands about twenty miles in width, as indicated on the enclosed diagram." This diagram is simply a reproduction of the map of probable route filed by said company. This map is a Minnesota state map of that period, upon which the probable route of said railroad is indicated by a black line drawn with pen and ink. Along and on
38 each side of this black line are two colored bands, one red and the other blue, which are probably intended to represent place and indemnity limits, but they are not so designated on the map, and their width is not stated. Measured according to the scale of the map, the red bands, corresponding to place limits, are about six miles in width on each side of the line of probable route, and the blue bands, corresponding to indemnity limits, are about nine miles in width on each side.

No specific mention of these colored bands is made in any of said letters and nothing upon the map of probable route indicates that such bands are intended, in any of themselves, to fix the extent of the withdrawal as requested or made, or that they are anything more than a mere approximation of place and in-
670 demnity limits. The withdrawal ordered by the Secretary of the Interior and made by the Commissioner of the General Land Office was of "a body of lands" about twenty miles in width." The place limits of ten miles on each side of the line of road provided for in the granting act, taken together, make a body of lands twenty miles in width. Measured according to the scale of the map here under consideration, the place limits supposed to be represented by the red bands make a body of lands about twelve miles in width, and the place and indemnity limits, supposed to be represented by the red and blue bands, taken together, make a body of lands about thirty miles in width. The objections to giving these colored bands controlling effect in determining the extent of said withdrawal are obvious and insuperable. Their width is not definite, and their purpose is not certain. The information which they disclose is not nearly so definite or certain as that conveyed by the terms of the letters ordering and making the withdrawal. They do not conform in width to the limits prescribed in the granting act, and, whether taken together or separately, do not constitute a body of lands of the width described in the withdrawal as ordered and made. Due regard can only be given to the terms of the granting act, the fact that the Secretary of the Interior in ordering the withdrawal was, in part at least, answering the inquiry of the Commissioner of the General Land Office as to whether the withdrawal should be of the lands in the place limits only, or of the lands in both place and indemnity limits, and to the terms of this withdrawal, by holding that the purpose and effect of the withdrawal was to withhold from disposition for the time being the lands which, if the line of probable route should become the line of definite location, would fall within the place limits of the grant and pass to the railroad company.

671 The withdrawal will be given effect accordingly.

Herewith are the papers.

Very respectfully,

E. A. HITCHCOCK, Secretary."

That thereafter, in the month of April, 1901, the said list known as Duluth list No. 9 filed by said Northern Pacific Rail-
road Company in the United States district land office
39 at Duluth, Minnesota, on October 17, 1883, as hereinbefore set forth, came before the commissioner of the general land office for examination and approval for patenting the lands to said company, but said commissioner, by his decision

of April 6, 1901, refused to approve said list, and rejected the same for the reason, as stated by him, that the lands therein described were reserved for the said Lake Superior and Mississippi Railroad Company at the date of the grant to said Northern Pacific Railroad Company, and were therefore excepted from the grant to said last named company. That from said decision by the commissioner of the general land office the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company appealed to the secretary of the interior, and the secretary of the interior refused to approve said list, but rejected the same, and rendered a decision, under date of July 16, 1901, in the words and figures following, to-wit:

"The Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, has appealed from your office decision of April 6, last, wherein it was held that certain described lands in the Duluth land district, Minnesota, and within the primary limits of the grant made by the act of July 2, 1864, (13 Stat., 365), in aid of the construction of the Northern Pacific Railroad, were excepted from the operation of said grant because they were, at the date of the passage of said act, within ten miles of the probable route of the Lake Superior and Mississippi Railroad in aid of the construction of which a grant was made by the act of May 5, 1864 (13 Stat., 64), and were embraced within the withdrawal of May 26, 1864, made on account of the last-mentioned grant.

Upon the adjustment of the limits of the grant made by the act of May 5, 1864, supra, to the line of definite location of the Lake Superior and Mississippi railroad, effected September 25th, 1866, by the filing and approval of the required map, the lands here in question were found to fall without said limits and were thereupon freed from said grant. The Northern Pacific Railroad was not definitely located opposite these lands until July 6, 1882, at which date they were free from adverse claim so far as shown by the record now before this department.

The appeal filed on behalf of the railway company is based upon the ground that the withdrawal of May 26, 1864, being a withdrawal upon a map of probable or general route, did not prevent congress from granting the lands so withdrawn in aid of the construction of the Northern Pacific railroad, and that they were included in the grant to that company made by the act of July 2, 1864, because falling without the limits of the grant made by the act of May 5, 1864, as established by the definite location of the Lake Superior and Mississippi railroad, no right ever attached to them under the earlier grant. The decision of the Court in the case of United States v. Oregon and California R. R. Co. (176 U. S., 28), is relied upon to sustain this claim.

In the case of Bardon v. Northern Pacific Railroad Co. (145 U. S., 535), one Robinson had settled upon a portion of an odd-numbered section within the limits of the grant made by the act of July 2, 1864, for which he filed a pre-emption declaratory statement on September 21, 1853. He died without making proof of payment under said filing, and on July 30, 1857, his heirs made payment for the land and certificates of purchase issued thereon. On August 5, 1865, said certificates and pre-emption filing were cancelled. In holding that said land was excepted from the operation of the grant here in question, it was said by the Court:

It is thus seen that when the grant to the Northern Pacific Railroad Company was made, on the 2nd day of July, 1864, the premises in controversy had been taken up on the pre-emption claim of Robinson, and that the pre-emption entry made was uncancelled; that by such pre-emption entry the land was not at the time a part of the public lands; and that no interest therein passed to that company. The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under the general laws. All lands, to which any claims or rights of others have attached, do not fall within the designation of public land. The statute also says that whenever, prior to the definite location of the route of the road, and of course prior to the grant made, any of the lands which would otherwise fall within it have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands are to be selected in lieu thereof under the direction of the Secretary of the Interior. There would therefore be no question that the pre-emption entry by the heirs of Robinson, the payment of the sums due to the government having been made, as the law allowed, by them after his death, took the land from the operation of the subsequent grant to the Northern Pacific Railroad Company, if the pre-emption entry had not been subsequently cancelled. But such cancellation had not been made when the act of congress granting lands to the Northern Pacific Railroad Company was passed; it was made more than a year afterwards. As the land pre-empted then stood on the records of the land department, it was severed from the mass of the public lands, and the subsequent cancellation of the pre-emption entry did not restore it to the public domain so as to bring it under the operation of previous legislation, which applied at the time to land then public. The cancellation only brought it within the category of public land in reference to future legislation. This, as we think, has long been the settled doctrine of this court.

See also Northern Pacific Railroad Company v. De Lacey (174 U. S. 622, 626).

41 Applying this ruling to the lands now in question, they were at the time of the grant to the Northern Pacific Railroad Company included within an existing and lawful withdrawal made in aid of a prior grant and were therefore not subject to sale or other disposition under general laws. They were not 'public lands' within the accepted meaning of those words (Barker v. Harvey, 181 U. S., 481 490) and were not within the terms of the grant to the Northern Pacific Railroad Company, which was of every alternate section of public land.'

While the decision in the case of United States v. Oregon and California Railroad Company, cited by appellant, gives color to the appellant's contention, it must be remembered that in that case the lands in controversy were not reserved under the prior grant or at all until after the date of the later grant under which they were held to have passed. They were public lands at the time of the later grant which was held to have embraced them. The case of Bardon v. Northern Pacific R. R. Co., supra, and kindred cases, were not referred to in the opinion of the court, and it can not be presumed that by any general discussion upon an immaterial point the court intended to overrule the Bardon and kindred cases.

That a right under the prior grant did not eventually attach to the lands here in question is immaterial; first, because the act of July 2, 1864, was grant in praesenti, and second, because a reservation on account of a prior grant will defeat a later grant like that of July 2, 1864, whether the lands are needed in satisfaction of the prior grant or not. Northern Pacific R. R. Co. v. Musser-Sauntry Co. (168 U. S. 604).

Your office decision is accordingly affirmed."

That in pursuance of said decision by the secretary of the interior, the commissioner of the general land office formally and finally cancelled said Duluth list No. 9.

XI.

That thereafter, to-wit: on October 2, 1901, one Mary E. Coffin applied at the United States district land office at Duluth, Minnesota, to select the south half of the southeast quarter (S 1/2 S. E. 1/4) of section twenty-seven (27) township fifty-two (52) north, range fifteen (15) west, under the provisions of the act of congress approved June 4, 1897, which said act provides that persons owning lands within the limits of certain forest reservations may relinquish such lands to the United States and select other land in lieu thereof. That the selection so made by said Mary E. Coffin, as aforesaid, was accepted by

the register and receiver of said land office, and was by them transmitted to the commissioner of the general land office
42 for his examination and approval for patenting to said Mary E. Coffin, and that said selection is now pending before said commissioner of the general land office awaiting such examination and approval.

It is further stipulated and agreed that it appears by the records of the Commissioner of the General Land Office, that all of section 27, township 57 north, range 15 west, situate in the Duluth District, Minnestoa, was offered for sale to the public, November 3rd, 1859, under proclamation of the President No. 643, and thereafter remained open to private sale or entry unless by reason of the matters and things hereinbefore set forth, it became lawfully withdrawn from sale or entry.

XII.

That the defendants herein, William O'Brien, Albert J. Lammers and George A. Lammers, claim some right, title and interest in the land above described, or in the timber thereon, under and through said Mary E. Coffin, and are entitled to all the rights to the timber here in controversy that said Mary E. Coffin ever possessed.

XIII.

That the principal value of said land consists in the timber standing thereon, and that the value of said timber so standing thereon, exclusive of the land, exceeds the sum of two thousand dollars.

XIV.

That said land hereinbefore described is vacant and unoccupied.

XV.

That the defendants claim the right, and intend to cut and remove the timber on the land above described.

XVI.

That said proceedings herein set forth are the only
43 proceedings had by the interior department involving the premises hereinbefore described.

JAMES B. KERR,
M. T. SANDERS,
Solicitors for Complainant.
J. N. SEARLES,
Solicitor for Defendants.

Dated: May 20th, 1903.

Indorsed: Stipulation of Facts. Filed June 15th, 1903. Henry D. Lang, Clerk. By Louise B. Trott, Deputy. Re-filed Aug. 19, 1903. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy.

44 EXHIBIT A.

W. K. M. 1902-213114
F. M. L. 134787 S. S. M.
4-207.

Department of the Interior.
General Land Office.
Washington, D. C. Jany. 8, 1903.

I, ..., Commissioner of the General Land Office, do hereby certify that the annexed map of the general route of the Lake Superior and Mississippi railroad filed in this office May 7, 1864, is a true and literal exemplification of the original now on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this Office to be affixed, at the City of Washington, on the day and year above written.

Seal of U. S. General Land Office.

(Signed) BINGER HERMANN,
Commissioner of the General Land Office.

FOLD OUT IS TOO LARGE TO BE FILMED

45 That thereafter, to-wit: On the 18th day of August, A. D. 1903, there was filed with said Clerk, A Decision of the Court directing the restraining and enjoining defendants from cutting or removing timber from the lands involved in said cause, in the words and figures following, to-wit:

United States Circuit Court, District of Minnesota, Fifth Division.

Northern Lumber Company,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin.

Decision.

This cause came on for final hearing June 15, 1903, upon the bill, the answer of the defendants William O'Brien, Albert J. Lammers and George A. Lammers, and the stipulation of facts on file; the Complainant appearing by James B. Kerr its solicitor, and the answering defendants by J. N. Searles their solicitor. The defendant Mary E. Coffin, though duly served with the Subpoena on the 3rd day of January, 1903, has never appeared in the suit, and is in default.

From the admissions in the pleadings and the Stipulated facts it appears that by an Act of Congress of May 5, 1864 (13 Stat. at Large, 64,) there was granted to the State of Minnesota, to aid in the construction of a railroad from St. Paul to the head of Lake Superior every alternate Section of public land of the United States, not mineral, designated by odd numbers to the amount of five alternate Sections per mile on each side of said railroad on the line thereof within said State.

46 Other provisions of the Act and affecting the terms of the grant do not affect the issues in this case. Said grant of land became vested in the Lake Superior and Mississippi Railroad Company, which on May 7, 1864, filed in the office of the Commissioner of the General Land Office, a map or diagram showing the projected general route of its railroad from St. Paul to a point on Lake Superior. On May 26, 1864, the said Commissioner transmitted a copy of said map or diagram to the register and receiver of the U. S. Land office at Duluth, Minnesota, with his letter informing them of the fact that the Secretary of the Interior had approved the withdrawal of the lands for the railroad, and directing them "to suspend from pre-emption settlement and sale, a body of lands about twenty miles in width as indicated on the enclosed diagram 'A' marked Lake Superior and Mississippi Railroad." The land in dispute, the South half of the South east quarter of Section twenty-seven (27) township fifty-two (52) North, of

Range fifteen (15) West, of the fourth principal Meridian, was co-terminous with and within ten miles of the general route of said railroad, as shown by the said map or diagram. Afterwards on the 25th day of September 1866 said Lake Superior and Mississippi Railroad Company filed in the office of said Commissioner of the General Land Office its map of the definite location of its said railroad from St. Paul to Duluth on Lake Superior; whereby it appeared and became definitely settled, that the land above described, and here in dispute was and is beyond and outside of any lands which could pass to or be obtained by the said railroad company under any of the terms of said land grant.

The Northern Pacific Railroad Company was created by Act of Congress of July 2, 1864, (13 Stat. at Large 365.) and authorized to construct and operate a continuous railroad and telegraph line from a point on Lake Superior in Minnesota or Wisconsin, westerly, within the United States and
47 North of the 45th parallel of latitude, to Puget Sound, with a branch by the Valley of the Columbia River to Portland, Oregon. It was granted every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as the company might adopt, through territories of the United States, and ten alternate sections per mile on each side of the railroad whenever it passed through any State. "Whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General land office."

The Northern Pacific Railroad Company afterwards definitely located its entire line from Ashland on Lake Superior in Wisconsin, to Puget Sound; and constructed and completed thereon its railroad and telegraph lines. In doing this, on July 6, 1882, it duly filed in the office of the Commissioner of the General Land Office, a map or plat duly approved by the Secretary of the Interior, showing the line of definite location of its said railroad from Thomson Junction in Minnesota to Ashland. On that same date the land here in dispute was and is co-terminous with and within twenty miles (ten alternate sections) of that portion of said railroad so definitely located between Thomson Junction and Ashland; and was public land of the United States, not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights, and non-mineral in character. The same land was also at the date of said grant to the Northern Pacific Railroad

Company, public land of the United States, and subject to that grant, unless the said withdrawal of lands by direction
48 of the Secretary of the Interior, for the benefit of the Lake Superior and Mississippi Railroad Company, as above set forth, operated to take said lands out of the category of public lands so granted to the Northern Pacific Railroad Company.

On October 17, 1883, said Northern Pacific Railroad Company filed in the U. S. Land Office at Duluth its certain list, known as Duluth List No. 9, wherein, among other lands, was listed the land in dispute, to bring such lands before the officers of the Interior Department for examination and patenting to that railroad company; which had at the time of filing said list paid the selection fees and fees for surveying said land. On April 6, 1901, the Commissioner of the General Land Office refused to approve said List No. 9, and rejected the same for the alleged reason that at the date of said grant to the Northern Pacific Railroad Company, the lands described in said list were reserved for the Lake Superior and Mississippi Railroad Company by said order of withdrawal and were therefore not included in the grant. Upon appeal to the Secretary of the Interior said ruling and decision of the Commissioner of the General Land Office was affirmed July 16, 1901.

In the year 1893, said Northern Pacific Railroad Company became insolvent; and in a suit in this Court to foreclose Mortgages upon its lands, property and franchises; and for the Sequestration and distribution of its property for the benefit of its creditors Secured and unsecured, Edward H. McHenry and Frank G. Bigelow were by this Court duly appointed receivers of all the property of said railroad company, and among other things authorized to sell the lands of said railroad company in Minnesota and to make contracts and deeds therefor; and on November 4, 1898, said receivers sold and conveyed by deed to Frederick Weyerhauser and John A. Humbird all the right, title and interest of the Northern Pacific Railroad
49 Company in said land here in dispute; and the said Weyerhauser and Humbird on March 4, 1899 conveyed to the Northern Lumber Company, a Wisconsin Corporation, the complainant herein, all their interest and estate thus acquired, in and to all the timber standing and growing on the land in dispute; which timber is of the value of more than two thousand dollars. All of Section 27, township 57 North, Range 15 West, being the section containing the land here in dispute, was on November 3, 1859, offered for sale to the public, under proclamation of the President, No. 643, and ever since has remained open to private sale or to entry unless withdrawn by reason of the matters hereinbefore stated.

On October 2, 1901, defendant Mary E. Coffin applied at the U. S. Land Office at Duluth to select the land here in dispute under the act of Congress of June 4, 1897, in lieu of lands relinquished by her within a forest reservation. Such selection was accepted by said register and receiver and transmitted by them to the Commissioner of the General Land Office for his examination and approval for patenting such land to said Mary E. Coffin; and the matter of said selection is still pending before said Commissioner, awaiting such examination and approval.

The principal value of said land is the timber thereon. The defendants William O'Brien, Albert J. Lammers and George A. Lammers have duly acquired from said Mary E. Coffin all her rights in and to that timber and intend to cut and remove the same as charged in the bill.

It therefore appears that the title to the land here in dispute is still in the United States, and while the legal title remains in the United States it can not be adjudged in a suit to which the United States is not a party that any one else has a valid equitable claim to the land. The disposition of the public lands, conformably to the acts of Congress, is vested exclusively in the Land department of the government; which must incidentally determine the rights of claimants. So long as the land is not patented it remains under the jurisdiction of the Land department, which has still the only power to correct any errors it may have made in respect to any application or contest concerning the lands. It is only after patent has issued, and the jurisdiction of the Land department has become exhausted, that a Court of Equity will take any cognizance of the question of who is entitled to the land so patented, upon the facts found by the officers of the Land department. Johnson v. Towsley, 13 Wall, 72. Samson v. Smiley, ibid. 91; Marquez v. Frisbie, 101 U. S. 473; Humbird v. Avery, 110 Fed. 465, 471. Complainants right to the timber on the land rests on the equitable claim of the Northern Pacific Railway Co. to the land, and the right of the answering defendants rests on the equitable claim of Mary E. Coffin to the same land, and these are matters still within the sole jurisdiction of the Land department to determine, and in respect to which this court can give no judgment.

It appearing however that the claims of the Complainant and of the answering defendants to the timber upon the land in dispute are made in good faith, and upon colorable grounds, and that such defendants have threatened and propose to cut and remove said timber, it is proper in order to preserve the rights of the Complainant that such defendant should be enjoined and restrained from cutting or removing such timber until patent

for such land shall have been issued by the United States; and until the further order of this Court.

51 Decree will be entered accordingly, but without costs.

WM. LOCHREN, Judge.

Indorsed: Decision restraining and enjoining defts. from cutting or removing timber &c. Filed August 18th, 1903. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy.

That on the 21st day of December, A. D. 1903, there was filed with said Clerk A Petition by Complainant for leave to file a supplemental Bill in said Cause, in the words and figures following, to-wit:

United States Circuit Court, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Petition for Leave to File Supplemental Bill.

The petition of the Northern Lumber Company, the above named complainant, respectfully shows that on or about the 29th day of December, 1902, your petitioner filed its bill in this court against the defendants William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin for the purpose of obtaining the decree of this court restraining said defendants from cutting or removing the trees and timber upon the

52 south half of the southeast quarter of section 27, township 52 north, range 15 west of the fourth principal meridian, and praying in the words and figures as follows, to-wit:

"For as much as your orator can have no adequate relief except in this Court, and to the end that it may obtain the relief to which it is justly entitled in the premises, your orator now prays the court to grant to it a writ of subpoena of the United United States, directed to the said defendants William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, requiring and commanding them to appear herein and answer, but not under oath, (an answer under oath being hereby expressly waived), the several allegations in this your orator's bill contained.

"And your orator further prays that your Honors may grant a writ of injunction issuing out of and under the seal of this honorable court, perpetually enjoining and restraining the said defendants, William O'Brien, Albert J. Lammers, George A. Lam-

mers and Mary E. Coffin, their agents, contractors, servants, workmen and employes from cutting or removing any trees or timber from the said south half of the southeast quarter (S ½ SE ¼) of section twenty-seven (27), township fifty-two (52) north, range fifteen (15) west, Minnesota.

And your orator prays that a provisional or preliminary injunction may be issued restraining the said defendants, their agents, contractors, servants, workmen and employes from cutting or removing any trees or timber from said land during the pendency of this cause."

Your petitioner further shows that the said Mary E. Coffin though being duly served with process of subpoena herein made no appearance to said bill and is now in default herein, but that said William O'Brien, Albert J. Lammers, and George A. Lammers entered their voluntary appearance by J. N. Searles, Esq., their solicitor; that thereafter such proceedings were had upon said bill that an answer was filed by said appearing defendants and a replication thereto by your petitioner and the cause heard upon an agreed statement of facts, whereupon William Lochren, one of the judges of this court, filed an opinion in writing holding that until the issuance of a patent for said land the court was without jurisdiction to finally determine the rights of the parties in and to said premises, but that it was proper that the defendants should be enjoined and restrained
53 from cutting and removing the timber from said premises until the issuance of said patent but no decree has yet been entered in pursuance of said decision; that after the filing of this decision and on or about the 16th day of November, 1903, the officers of the United States executed and issued a patent to the defendant Mary E. Coffin purporting to convey the premises above described.

Your petitioner therefore prays that leave may be granted to it to file a supplemental bill against the said William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin setting forth the execution and issuance of said patent and with such prayer for relief as may be proper in the premises.

JAMES B. KERR, &
M. T. SANDERS,
Solicitors for Petitioner.

Indorsed: Petition to file Supplemental Bill. Filed December 21, 1903. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

That on the 16th day of May, A. D. 1904, there was filed with said Clerk a Stipulation for the filing of a Supplemental Bill in said cause, in the words and figures following, to-wit:

United States Circuit Court, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lam-
54 mers and Mary E. Coffin, Defendants.

Stipulation.

It is hereby stipulated by and between the complainant and the defendants William O'Brien, Albert J. Lammers and George A. Lammers, by their respective solicitors, that an order may be entered herein permitting the complainant to file a supplemental bill herein in the words and figures of the copy attached hereunto, and that thereafter the cause shall proceed to hearing upon the pleadings thereto without objection or exception to the right of said complainant to proceed herein by supplemental bill.

Dated May 3, 1904.

C. W. BUNN,
JAMES B. KERR,
Solicitors for Complainant.
J. N. SEARLES,
Solicitor for defendants William O'Brien, Albert J. Lammers and George A. Lammers.

Indorsed: Stipulation and Supplemental Bill. Filed May 16th, 1904. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

That on the same day, to-wit: On the 16th day of May, A. D. 1904, there was filed with said Clerk An Order of Court granting leave to file a Supplemental Bill in said Cause, in the words and figures following, to-wit:

55 Circuit Court of the United States, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

The petition of the complainant above named, for leave to file a supplemental bill herein, coming on to be heard, and it appearing to the court that the defendant Mary E. Coffin, was duly served with process of subpoena herein upon the original bill of complaint, but has made no appearance herein: and it appearing that the defendants William O'Brien, Albert J. Lammers and George A. Lammers have by written stipulation,

signed by their solicitor filed herein, consented to the entry of an order permitting the filing of such supplemental bill herein:

It Is Now Ordered: That the complainant be, and it is hereby permitted to file its supplemental bill, as prayed in its said petition, and upon the filing of such supplemental bill herein on or before the 23rd day of May, 1904, the said defendants William O'Brien, Albert J. Lammers and George A. Lammers and Mary E. Coffin, are hereby required to plead to said supplemental bill on or before the 6th day of June, 1904.

By the Court,

WM. LOCHREN, Judge.

Dated May 16th, 1904.

56 Indorsed: Order permitting the filing of Supplemental Bill, &c. Filed May 16th, 1904. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

That attached to the Stipulation for the filing of a Supplemental Bill in said Cause was the proposed Supplemental Bill in the words and figures following, to-wit:

United States Circuit Court, for the District of Minnesota. Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Supplemental Bill.

To the Honorable, the Judges of the United States Circuit Court for the district of Minnesota, in Equity sitting:

Your orator, Northern Lumber Company, shows to your honors that on or about the 29th day of December, 1902 your orator exhibited its original bill of complaint in this court against William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, the defendants hereinafter named as defendants thereto, and in and by said original bill of complaint your orator averred that the Northern Pacific Railroad Company was a corporation organized under the laws
57 of the United States authorized to construct and maintain a railroad from a point on Lake Superior to some point on Puget Sound, and that by an act of Congress of the United States approved July 2nd, 1864 lands were granted to said Railroad Company to aid in the construction of said railroad to the extent of every alternate section of public land, not mineral, designated by odd numbers to the amount of

twenty alternate sections per mile on each side of said railroad line, as said company might adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it should pass through any state, and whenever on the line thereof the United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights when the line of said road should be definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.

Your orator further shows that in said original bill of complaint it alleged that said railroad company duly and definitely located said railroad and particularly that portion thereof extending from Thompson Junction in the state of Minnesota easterly to Ashland in the state of Wisconsin on the 6th day of July, 1882, and that thereafter said company duly constructed the whole of said line of railroad, as required by the provisions of said act of July 2nd, 1864.

Your orator further shows that in and by said original bill of complaint your orator alleged that the south half of the southeast quarter of section 27, township 52 north, of range 15 west of the Fourth Principal Meridian was and is opposite to and within twenty miles of that portion of said road so located and [constructeded] from Thompson Junction to Ashland and at the date of said grant and the date of said
58 definite location was public land of the United States not reserved or otherwise appropriated and was and is non-mineral in character, and that on October 17th, 1883 said Northern Pacific Railroad Company listed said land as a part of its land grant in the United States district land office at Duluth, Minnesota.

Your orator further shows that in and by said original bill of complaint it alleged that your orator succeeded by purchase to the rights of said Northern Pacific Railroad Company in and to the lands above described.

Your orator further shows that in and by said original bill of complaint your orator alleged that a certain grant of lands made by act of congress of the United States approved May 5th, 1864 to the state of Minnesota was conferred upon the Lake Superior and Mississippi Railroad Company, a corporation, and that said last named company on May 7th, 1864 filed in the office of the Commissioner of the General Land Office a map or diagram showing the general route of its railroad from St. Paul to a point on Lake Superior, and that thereafter and on May 26th, 1864, the Commissioner of the General Land office transmitted to the United States district land officers at

Duluth a letter directing said district land officers to withdraw from pre-emption, settlement and sale a certain body of lands therein referred to and indicated upon an accompanying diagram, but that said attempted withdrawal of lands was wrongful and without authority of law.

Your orator further shows that in and by said original bill of complaint it alleged that thereafter and on September 25th, 1866 the Lake Superior and Mississippi Railroad Company definitely located its line of railroad from St. Paul to a point on Lake Superior and filed a map thereof in the office of the Commissioner of the General Land office, and that
59 thereupon said Commissioner defined the limits of said land grant and that the lands above described, namely: the south half of the southeast quarter of section 27, township 52 north, of range 15 west of the fourth principal meridian fell wholly outside and beyond the limits of said grant, and your orator further shows that in and by said original bill of complaint it was alleged that the list of said Northern Pacific Railroad Company covering the lands above described came before the Commissioner of the General Land Office for examination and approval for patenting in the month of April, 1901, but said Commissioner, acting under a mistake of law refused to approve said list and rejected the same and held that the land above described was excepted from the said grant to said Northern Pacific Railroad Company by reason of the pretended withdrawal for the benefit of said Lake Superior and Mississippi Railroad Company.

Your orator further shows that in and by said original bill of complaint it alleged that on October 2nd, 1901, the defendant, Mary E. Coffin applied to select the land above described under the provisions of the act of congress approved June 4th, 1897, authorizing the selection of public lands in lieu of lands relinquished to the United States within the limits of certain forest reservations. That the said selection of said defendant Coffin was wrongfully and unlawfully accepted by the register and receiver of said district land office and transmitted to the Commissioner of the General Land office for his examination and approval, and at the time of filing said original bill said selection by said defendant Coffin was pending before the Commissioner awaiting his examination and approval.

And your orator further shows that in and by said original bill of complaint it was alleged that said selection by
60 said defendant Coffin was accepted by said register and receiver solely by reason of the erroneous decision of the Secretary of the Interior hereinbefore referred to, and that the accuracy of said decision and the effect of said pretended

reservation for the benefit of the Lake Superior and Mississippi Railroad Company was the only question of law or fact at issue between your orator and the defendants named in said original bill of complaint.

And your orator further shows that in and by said original bill of complaint it was alleged that the defendants named therein, namely: William O'Brien, Albert J. Lammers, George A. Lammers claimed some right, title and interest in the land above described or in the timber thereon under and through said Mary E. Coffin, and that said defendants and each of them claimed that said land was excepted from said grant to the Northern Pacific Railroad Company.

And your orator further shows that in and by said original bill of complaint it was alleged that the principal value of said land consisted in the timber standing thereon, and that the value of said timber, exclusive of the land, exceeded the sum of two thousand dollars, and that said land was vacant and unoccupied, and the said defendants threatened and intended, and would unless restrained by the order of this Court, enter upon said land and cut and remove the timber therefrom and impair and destroy the value of the orator's interest in said land and said timber.

And your orator further shows that said original bill of complaint concluded with a prayer for relief in the words and figures as follows:

"For as much as your orator can have no adequate relief except in this court, and to the end that it may obtain the relief to which it is justly entitled in the premises, your orator now prays the Court to grant to it a writ of subpoena of the United States, directed to the said defendants William
61 O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, requiring and commanding them to appear herein and answer, but not under oath (an answer under oath being hereby expressly waived) the several allegations in this your orator's bill contained.

And your orator further prays that your honors may grant a writ of injunction issuing out of and under the seal of this honorable court, perpetually enjoining and restraining the said defendants, William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, their agents, contractors, servants, workmen and employes from cutting or removing any trees or timber from the said south half of the southeast quarter (S ½ S. E. ¼) of section twenty-seven (27) township fifty-two (52) north, range fifteen (15) west, Minnesota.

And your orator prays that a provisional or preliminary injunction may be issued restraining the said defendants, their agents, contractors, servants, workmen and employes from cutting or removing any trees or timber from said land during the pendency of this cause."

And your orator further shows that the defendant Mary E. Coffin was duly served with process of subpoena but has made no appearance herein, and that on the 30th day of December, 1902 the defendants William O'Brien, Albert J. Lammers and George A. Lammers caused their voluntary appearance to be entered herein by their solicitor, J. N. Searles, Esq., and thereupon and on January 12th, 1903, in pursuance of an order of this court made in that behalf on January 12th, 1903, a writ of injunction issued against said defendants and all and each of them restraining them and all persons claiming under them from cutting or removing any of the timber standing upon said premises until the further order of the court, and in and by said order so directing the issuing of said injunction it was further ordered that if within thirty days from the date of the entry thereof the said defendants William O'Brien, Albert J. Lammers and George A. Lammers should execute under their respective hands and seals an instrument in writing approved by the judge of said court binding said William O'Brien, Albert J. Lammers and George A. Lammers, jointly and severally, to pay to your orator the sum of $3500 Dollars in the event that any of the trees or timber standing on said premises should be cut or removed by said defendants or any of
62 them, or any persons claiming under them or any of them, if it be finally held in this cause that the complainant is the owner of said premises and the trees and timber standing thereon, and should file such instrument in writing with the clerk of this court, then the writ of injunction thereby ordered to be issued should be forthwith recalled, vacated and annulled.

And your orator further shows that within the thirty days specified in said order of January 12th, 1903 such instrument in writing so required by said order was duly filed with the clerk of this court.

Your orator further shows that said defendants William O'Brien, Albert J. Lammers and George A. Lammers thereafter filed their joint and several answer to said original bill of complaint therein they aver, among other things, that said land described above was excepted from the grant of said Northern Pacific Railroad Company and that your orator was without title thereto or interest therein.

And your orator further shows that a replication was duly filed by your orator to the said answer of said defendants, and thereafter an agreed statement of facts signed by the respective solicitors for the complainant and the answering defendants was duly filed herein and upon said stipulation of facts and upon the pleadings herein said cause came on for hearing and on the 18th day of August, 1903 an opinion in writing was filed herein by the Honorable William Lochren, one of the judges of said court, wherein a conclusion was set forth that in as much as no patent for said land had been issued by the United States the court was without jurisdiction to finally determine the rights of the parties, and it was further decided
63 that the clams of both the complainant and the answering defendants were made in good faith and upon colorable grounds, and that in as much as said defendants had threatened and proposed to cut and remove said timber it was proper in order to preserve the rights of the complainant that said defendants should be enjoined and restrained from cutting or removing the said timber until patents for said land shall have been issued by the United States and until the further order of this Court, and it was determined that a decree should be entered in accordance with such conclusion but without costs.

Your orator further says that no decree has yet been entered herein and that no further proceedings have been taken in said cause.

And your orator further shows by way of supplement that since the hearing in said cause the officers of the United States have executed and issued a patent of the United States to the defendant Mary E. Coffin upon her said selection hereinbefore set forth purporting to convey to said Mary E. Coffin the said south half of the southeast quarter of section 27, township 52 north, range 15 west of the fourth principal meridian, and that said patent bears date the 16th day of November, 1903.

And your orator prays that you- Honors may grant a writ of injunction issuing out of and under the seal of this honorable court perpetually enjoining and restraining the said defendants William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, their agents, contractors, servants, workmen and employes, or any person claiming under them or either of them, from cutting or removing any trees or timber from the said south half of the southeast quarter of section twenty-seven (27), township fi-ty-two (52) north, range fifteen

(15) west of the fourth principal meridian, and your orator prays that it may have the same relief against the said
64 defendants above named that it might have had if the facts hereinbefore stated by way of supplement had been stated in your orator's original bill of complaint.

And your orator prays that the said defendants and each of them may be required to make answer, but not under oath (an answer under oath being hereby expressly waived) to the several allegations in this, your orator's supplemental bill contained.

C. W. BUNN &
JAMES B. KERR,
Solicitors for complainant.

United States of America
State of Minnesota
County of Carlton—ss.

R. M. Weyerhaeuser, being first duly sworn, deposes and says that he is an officer and agent of the above named complain-t, to wit: its manager; that he has read the above supplemental bill of complaint and knows the contents thereof and that the same is true.

R. M. WEYERHAEUSER.

Subscribed and sworn to before me this 21st day of December, 1903.

[Notarial Seal] FRANK B. POOLE,
Notary Public Carlton County, Minnesota.

65 That on the 5th day of July, A. D. 1904, there was filed with said Clerk the answer of defendants Wm. O'Brien, A. J. Lammers and Geo. A. Lammers to the supplemental bill in said cause, in the words and figures following, to-wit:

Circuit Court of the United States for the District of Minnesota Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Now comes William O'Brien, Albert J. Lammers and George A. Lammers, defendants and answering the Supplemental Bill herein as alleged, as follows:

I.

These defendants admit the allegations of the complainant's Supplemental Bill herein, so far as relates to the general nature and character of the original bill of complaint herein, the original answer of the defendants and the original replication of the complainant thereto, and also as to the subsequent proceedings by way of stipulation of facts and the subsequent order for judgment herein, and allege that the facts heretofore stipulated upon which the foregoing order for judgment was based, represented all of the facts and issues submitted to this court on the original pleadings herein.

66 II.

Further answering, these defendants aver on information and belief, that prior to the making of the decision entered upon the hearing of the Original Bill, answer and replication, patent has issued from the United States to said Mary E. Coffin on her aforesaid application to enter the same, but these defendants aver on information and belief that this complainant requested the issue of said patent by the United States to said Mary E. Coffin, and to facilitate and procure the issue thereof this complainant completed the necessary proofs to be made by the said Mary E. Coffin to entitle her to said patent; that is to say, this complainant furnished a certificate of the County Clerk of Sheridan County, Wyoming, where the base land for her selection of the lands in controversy under the so-called Forest Reserve Scrip were situated, to the effect that no taxes on said lands so surrendered by said Mary E. Coffin to the United States as a basis for her selection of the lands in controversy remained unpaid. And defendants aver on information and belief that the said patent would not have issued to the said Mary E. Coffin had it not been for the active cooperation, assistance and request of this complainant, as aforesaid.

Wherefore these defendants pray that they may be hence dismissed with their costs and disbursements.

J. N. SEARLES,
Solicitor of the defendants, William O'Brien, Albert J. and George A. Lammers, Stillwater, Minn.

State of Minnesota,
County of Washington—ss.

George A. Lammers being first duly sworn upon oath, says that he is one of the defendants in the foregoing within entitled action; that the foregoing answer is true of his own

67 knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

GEORGE A. LAMMERS.

Subscribed and sworn to before me this 2 day of July, 1904.
[Notarial Seal .....
Washington Co. Minn.] Notary Public,
Washington County, Minn.

Indorsed: Answer to Supplemental Bill. Filed July 5, 1904. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

That on the 30th day of July, 1904, there was filed with said Clerk the Replication of Complainant to the answer to the Supplemental Bill of Complainant in said cause, in the words and figures following, to-wit:

Circuit Court of the United States for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Replication of Northern Lumber Company.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefits and ad-
68 vantages of exception which may be had and taken to the manifold insufficiencies of said answer, for replication thereto says that it will aver, maintain and prove its bill of complaint to be true, certain and sufficient in the law to be answered unto; and that said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by repliant without this; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the repliant is and will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

JAMES B. KERR.
Solicitor for Complainant.

Indorsed: Replication to Answer to Supplemental Bill. Filed July 30th, 1904. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

That on the 15th day of August, 1904, there was filed with said Clerk an Order of Court fixing the time in which to take testimony in said cause, in the words and figures following, to-wit:

Circuit Court of the United States for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

69 The motion of the Complainant herein for an order fixing the time for taking of the testimony by the respective parties upon the issues raised herein by the pleadings, coming on to be heard, James B. Kerr, Esq. appearing for complainant, and J. N. Searles appearing for the defendants, William O'Brien, Albert J. Lammers, George A. Lammers;

It is ordered that the defendants have until the 30th day of September, 1904, within which to take testimony in support of their answer to the supplemental bill herein, and that the complainant have until 31st day of October thereafter within which to take testimony in rebuttal.

By the Court,

WM. LOCHREN, Judge.

Dated St. Paul, Minn. August 15th, 1904.

Indorsed: Order fixing time to take testimony. Filed August 15th, 1904. Henry D. Lang, Clerk. By E. Catherine Neff. Deputy.

That on the 16th day of January, A. D. 1905, there was filed with said Clerk a Stipulation setting the date for the final hearing of said Cause, in the words and figures following, to-wit:

Circuit Court of the United States for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
70 William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin.

It is Hereby Stipulated by and between the parties to the above entitled cause that the same may be set down for final hearing at the Circuit Court Room in the City of St. Paul on

the 16th day of January, 1905, at 10 o'clock in the forenoon and that an order to that effect may be entered herein upon this stipulation.

JAMES B. KERR,
Solicitor for Complainant.
J. N. SEARLES,
Solicitor for Defendants, William O'Brien, Albert J. Lammers, and George A. Lammers.

Dated,

Indorsed: Stipulation setting date of final hearing. Filed January 16th, 1905. Henry D. Lang, Clerk.

That further on the 16th day of January, A. D. 1905, there was filed with said Clerk An Order of Court setting the case for hearing in the words and figures following, to-wit:

Circuit Court of the United States, District of Minnesota, Fifth Division.

Northern Lumber Company, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

71 The court having made an order herein on the 15th day of August, 1904, fixing the time for the taking of testimony by the respective parties upon the issues raised by the supplemental bill of complaint, the answer and the replication, and the defendants being required by said order to take testimony in support of said answer to the supplemental bill on or before the 30th day of September, 1904, the complainant having thirty days thereafter within which to take testimony in rebuttal, and the defendants having failed to take any testimony in support of their said answer and the parties having consented that the above entitled cause be set down for final hearing upon all the pleadings and files herein, it is now

Ordered that said cause be so set down for final hearing at the United States court room in the city of St. Paul on this the 16th day of January, 1905, at ten o'clock in the forenoon.

By the Court,
WM. LOCHREN, Judge.

Indorsed: Order setting the case for hearing. Filed January 16th, 1905. Henry D. Lang, Clerk.

That on the 24th day of January, A. D. 1905, there was filed with said Clerk the Opinion of Court directing entry of a Decree dismissing the Bill of Complaint and Supplemental Bill in said cause, in the words and figures following, to-wit:

United States Circuit Court,
District of Minnesota,

Fifth Division.

Northern Lumber Company, Complainant,
v.
72 William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

Mr. James B. Kerr for complainant.
Mr. J. N. Searles for defendants.

January 16, 1905.

Lochren, J., (Orally). On May 5th, 1864, congress enacted a statute granting to the Lake Superior & Mississippi Railroad Company certain lands in aid of the construction of a railroad from St. Paul to some point on Lake Superior, State of Minnesota; the grant being of the odd numbered sections within specified limits; reserving lands which had been disposed of or which were covered by pre-emption or homestead entry, or in any other manner appropriated or reserved; and providing for indemnity in lieu of any such lands from odd sections within certain other specified limits. On the 7th day of May, 1864, two days later, the Lake Superior & Mississippi Railroad Company filed a map of its general route in the Land Department, and thereupon, the Commissioner of the General Land Office issued an order withdrawing lands in odd sections from preemption or homestead entries, within the supposed limits of this grant; and this order included the lands in question. On July 2, 1864, the land grant to the Northern Pacific Railroad Company was enacted, and the lands in question also came within the place limits of the grant, to that road according to the line of definite location which was afterwards adopted by the Northern Pacific Company and filed with the Secretary of the Interior.

73 The only question in the case is, whether these lands, having been withdrawn by executive authority prior to the passage of the act granting the lands to the Northern Pacific Railroad Company, this took them out of that grant; as when the line of definite location of the Lake Superior & Mississippi Railroad was afterwards determined upon, adopted and filed, these lands did not come within the limits of lands granted to that company.

According to the usage of the Land Department for a long time, it had been customary to withdraw the lands along the lines of railroads which would come within the definition of lands which were granted to aid their construction, from public sales and from entry by homesteaders or preemptors, for the

purpose of reserving them for such grants; and that had been done in this case with reference to the supposed line of the Lake Superior & Mississippi Railroad, before the grant to the Northern Pacific Company.

The question is whether this reservation of them by executive authority excepted them or took them out of the subsequent grant to the Northern Pacific Railroad Company. It seems to me, that under the authority of the case of Wolcott v. The Des Moines Company, 5 Wall, 681, it did have that effect; although when the Lake Superior & Mississippi Railroad was afterwards built, the line had been changed so that the lands did not come within its grant, but fell entirely outside of it.

Under the authority of that case, at the time of the passage of the act making the grant to the Northern Pacific Railroad Company, the lands were by executive authority, in the supposed carrying out of the act of congress making the prior land grant, reserved and withdrawn, and did not then stand in the category which would be understood by the general term, public lands, but came within the exception of lands that had been reserved.

74 I am inclined to think that this conclusion is determinative of this case, and that a decree must be entered dismissing the bill.

Ordered accordingly.

January 16, 1905.

Indorsed: Decision. Filed January 24, 1905. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

That further on the 24th day of January, A. D. 1905, there was filed with said Clerk the Decree of the Court in said cause, in the words and figures following, to-wit:

United States Circuit Court, District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants.

This cause having come on to be heard upon the bill of complaint, answer of defendants O'Brien, Albert J. Lammers and George A. Lammers, the replication of complainant to such answer, the supplemental bill of complaint, the answer of said O'Brien, Albert J. Lammers and George A. Lammers thereto and the replication of complainant thereto, and the stipulation of facts on the part of said complainant and defendants

O'Brien, Albert J. Lammers and George A. Lammers; and the defendant Mary E. Coffin being in default for want of appearance, although having been duly served with the subpoena herein, and having been argued by counsel for the re-
75 spective parties who have so appeared as aforesaid.

Now, Therefore, on consideration thereof, it is hereby ordered, adjudged and determined, and the court doth hereby order, adjudge, and decree, as follows, viz:

That the complainant's said bill of complaint and supplemental complaint herein be and the same hereby is dismissed, with costs to the defendants William O'Brien, Albert J. Lammers and George A. Lammers, to be taxed.

WM. LOCHREN, Judge.

Indorsed: Decree. Filed Jany. 24, 1905. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

That on the 2nd day of February, A. D. 1905, there was filed with said Clerk the Petition on Appeal and allowance thereof, Assignment of Errors and Bond on Appeal; which said documents are, in words and figurs, as follows, to-wit:

Circuit Court of the United States, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant and Appellant.

vs.

William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants and Appellants.

The above named complainant, Northern Lumber Company, conceiving itself aggrieved by the decree entered herein on the 24th day of January, 1905, does hereby appeal from said decree to the United States Circuit Court of Appeals for
76 the Eighth Circuit, and prays that this, its appeal, may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated, January 31, 1905.

JAMES B. KERR,
Solicitor for Appellant.

The foregoing appeal is allowed, February 1, 1905.

WM. LOCHREN, Judge.

Endorsed: Petition for Appeal. Filed February 2, 1905. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk. Circuit Court of the United States, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant and Appellant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants and Appellees.

And now in the above entitled cause and at the time of filing its petition for appeal herein, comes the said appellant, by James B. Kerr, its solicitor, and says that in the record and proceedings in the above entitled matter it manifestly appears that the court erred in the following particulars, to wit:

First. In adjudging that the land described in the bill of complaint herein was not public land of the United
77 States on July 2, 1864, within the meaning of the act of congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific Coast by the northern route", approved July 2, 1864.

Second. In adjudging that the land described in the bill of complaint herein did not pass to the Northern Pacific Railroad Company under said act of congress approved July 2, 1864.

Third. In dismissing the bill of complaint.

Fourth: In dismissing the supplemental bill of complaint.

Wherefore, appellant prays that the decree of said Circuit Court of the United States for the District of Minnesota in the above entitled cause be reversed.

JAMES B. KERR,
Solicitor for Appellant.

Indorsed: Assignment of Errors. Filed February 2, 1905. Henry D. Lang, Clerk. By Thos. H. Pressnel, Deputy Clerk.

Circuit Court of the United States, for the District of Minnesota, Fifth Division.

Northern Lumber Company, a corporation, Complainant and Appellant,
vs.
William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants and Appellees.

78 Know All Men By These Presents, That we, F. Weyerhaeuser and J. W. Lusk, are held and firmly bound unto the defendant above named in the sum of five hundred dollars

($500.00) to be paid to said defendants, for the payment of which [will] and truly to be made we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of January in the year of our Lord one thousand nine hundred and five.

Whereas, the above named complainant has prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the decree rendered in the above entitled suit by the Circuit Court of the United States for the District of Minnesota, Fifth Division.

Now, Therefore, The condition of this obligation is such that, if the above named appellant shall prosecute said appeal to effect and answer all damages and costs if it fails to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full [force] and virtue.

Signed, Sealed and
Delivered in Presence of
P. Hendrickson. F. WEYERHAEUSER, [Seal]
J. W. Mahan. J. W. LUSK. [Seal]

United States of America.

District of Minnesota,
County of Ramsey—ss.

Be It Known, That on this 31 day of January, 1905, before me personally appeared F. Weyerhaeuser and J. W.
79 Lusk, to me known to be the persons described in and who executed the foregoing bond, and acknowledged the same to be their free act and deed.

[Notarial Seal,
Ramsey County, Minnesota] P. HENDRICKSON,
Notary Public,
Ramsey County, Minnesota.

United States of America.

District of Minnesota,
County of Ramsey—ss.

F. Weyerhaeuser and J. W. Lusk, the sureties named in and who executed the foregoing bond, being first duly sworn, doth each for himself depose and say that he is a resident and freeholder of the state of Minnesota and worth the amount of one thousand dollars above his debts and liabilities and exclusive of his property exempt from execution.

F. WEYERHAEUSER,
J. W. LUSK.

Subscribed and Sworn to before me this 31 day of January, A. D. 1905.

[Notarial Seal, Ramsey Co. Minn.]

P. HENDRICKSON,
Notary Public,
Ramsey County, Minnesota.

The foregoing bond is approved as to form and sufficiency this 1st day of February, 1905.

WM. LOCHREN.

Indorsed: Bond on Appeal. Filed February 2, 1905. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

United States of America—ss.

80 To William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals of the Eighth Circuit, at the City of St. Louis, sixty days from and after the date hereof, pursuant to an appeal taken out of and allowed by the Circuit Court of the United States for the District of Minnesota, Fifth Division, wherein the Northern Lumber Company is appellant and William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin are appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and why speedy justice should not be done between the parties in that behalf.

Witness the Honorable William Lochren, Judge of the United States District Court, for the District of Minnesota, at St. Paul, in said district, this 1st day of February, A. D. 1905.

WM. LOCHREN,
United States District Judge, for the District of Minnesota.

81 Due service of this instrument and receipt of copy thereof admitted at Stillwater, Minn., this 2 day of February, 1905.

J. N. SEARLES,
Attorney for O'Brien, A. J. & Geo. A. Lammers, appellees.

Entered No. 703. Circuit Court of the U. S. for the Dist. of Minnesota, Fifth Division. Northern Lumber Company vs. William O'Brien, Albert J. Lammers, Geo. A. Lammers and Mary E. Coffin. Citation. Filed February 23d, 1905. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk. James B. Kerr, Solicitor for Appellant.

82 United States of America—ss.

To William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals of the Eighth Cir-

cuit, at the City of St. Louis, sixty days from and after the date hereof, pursuant to an appeal taken out of and allowed by the Circuit Court of the United States for the District of Minnesota, Fifth Division, wherein the Northern Lumber Company is appellant and William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin are appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and why speedy justice should not be done between the parties in that behalf.

Witness the Honorable William Lochren, Judge of the United States District Court, for the District of Minnesota, at St. Paul, in said district, this 1st day of February, A. D. 1905.

WM. LOCHREN,
United States District Judge,
For the District of Minnesota.

Due service of a similar copy purporting to be a true copy of the original citation is hereby admitted at Boise, Idaho, this 14th day of Feb., 1905.

MARY E. COFFIN.

83 United States of America

Circuit Court of the United States, District of Minnesota, Fifth Division.

I, Henry D. Lang, Clerk of said Circuit Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing containing 79 pages numbered consecutively from 1 to 82 inclusive, is a true and complete transcript of the Record, Process, Pleadings, Orders, Evidence, Final Decree and all other proceedings in the cause entitled Northern Lumber Company, Complainant, vs. William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, Defendants; and I do further certify and return that I have annexed to said transcript and included within said paging the original Citation with proof of service thereof.

Seal
U. S.
Circuit Court
Fifth Division
Dist. of Minnesota.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Duluth, in the District of Minnesota, this 25th day of February, A. D. 1905.

HENRY D. LANG, Clerk.
By Thos. H. Pressnell, Deputy.

Filed Mar. 4, 1905. John D. Jordan, Clerk.

(*Appearance of Counsel for Appellant.*)

On the fourth day of March, A. D. 1905, an appearance of counsel for appellant was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2219.

NORTHERN LUMBER COMPANY, Appellant,
vs.
WILLIAM O'BRIEN ET AL.

The Clerk will enter my appearance as Counsel for the Appellant.
JAMES B. KERR.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2219. Northern Lumber Company, Appellant, *vs.* William O'Brien, *et al.* Appearance. Filed Mar. 4, 1905. John D. Jordan, Clerk. James B. Kerr, Counsel for Appellant.

(*Appearance of Counsel for Appellees.*)

And on the tenth day of March, A. D. 1905, an appearance of counsel for appellees was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE NORTHERN LUMBER COMPANY, Complainant & Appellant,
vs.
WILLIAM O'BRIEN, A. J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN, Defendants & Respondents.

To the Clerk of said Court:

Please enter my appearance as Solicitor for the above named respondents, William O'Brien, A. J. Lammers and George A. Lammers.

Dated at Stillwater, Minn. this 8th day of March, 1905.

J. N. SEARLES,
Solicitor for Respondents.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. 2219. Northern Lumber Co., Appt., *v.* Wm. O'Brien *et als.*, Respt. J. N. Searles, Attorney for Respondents, 11 Mower Block, Stillwater, Minnesota. Filed Mar. 10, 1905. John D. Jordan, Clerk.

(*Order of Submission.*)

And on the fifth day of June, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1905.

No. 2219.

THE NORTHERN LUMBER COMPANY, Appellant,
vs.
WILLIAM O'BRIEN ET AL.

Appeal from the Circuit Court of the United States for the District of Minnesota.

MONDAY, *June* 5, 1905.

This cause having been called for hearing in its regular order, argument was commenced by Mr. James B. Kerr for appellant, continued by Mr. J. N. Searles for appellees and concluded by Mr. James B. Kerr for appellant.

Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twenty-sixth day of July, A. D. 1905, an opinion of said Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1905.

No. 2219.

NORTHERN LUMBER COMPANY, Appellant,

vs.

WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN, Appellees.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. James B. Kerr, for appellant.
Mr. J. N. Searles, for appellees.

Before Van Devanter, Circuit Judge, and Carland and Pollock, District Judges.

Syllabus.

1. PUBLIC LAND—SETTLED MEANING OF TERM IN LEGISLATION OF CONGRESS.—The words "public land" have long had a settled meaning in the legislation of Congress and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made.
2. SAME — WITHDRAWAL FOR BENEFIT OF RAILROAD LAND GRANT.—Where a withdrawal of public lands along the route of a railroad, in aid of which a grant of lands has been made by Congress, is made by the chief officers of the land department, in advance of the definite location of the route of such road, in order that the lands may be preserved for the ultimate satisfaction of the grant, such withdrawal, if not made in opposition to the terms of the grant or other congressional enactment, is a reservation made by competent authority. The reservation removes the lands embraced therein from the category of public land and excludes them from subsequent railroad land grants containing no clear declaration of an intention to include them, even though it subsequently transpires that the withdrawal was ill-advised or that the lands are not required for the satisfaction of the grant.
3. SAME—GRANT TO NORTHERN PACIFIC RAILROAD COMPANY.—The grant to the Northern Pacific Railroad Company made by the act of July 2, 1864, 13 St. 365, was one *in præsenti* and was in terms confined to public land. Land not public at the date of the grant was not granted, even though it subsequently became of that character. Bardon *v.* Northern Pacific Railroad Co., 145 U. S. 535, followed; United States *v.* Oregon & California Railroad Co., 176 U. S. 28, distinguished.

Statement.

This is a suit in equity brought by the appellant to obtain a decree perpetually enjoining the appellees from cutting or removing the timber standing on part of an odd-numbered section of land in Northern Minnesota. The land is vacant and unoccupied, and the timber thereon gives it its principal value. The appellant claims full title, under the grant of public lands made to the Northern Pacific Railroad Company by the act of Congress of July 2, 1864, 13 St. 365. When the suit was brought the appellees were asserting a right to cut and remove the timber under a claim to the land initiated under the forest reserve lieu land provision in the act of Congress of June 4, 1897, 30 St. 11, 36. The claim under the grant to the railroad company had been presented to and rejected by the land department of the Government prior to the initiation of the claim under the act of June 4, 1897. 31 Land Decisions, 32. The latter claim was initiated prior to the bringing of the suit and, as shown by the supplemental bill and the answer thereto, was perfected into full title by the issuance of a patent thereon during the pendency of the suit. At the date of the grant to the Northern Pacific Railroad Company the land was withdrawn from pre-emption, settlement and sale in order that it might be ultimately available for the satisfaction of a prior grant of lands made by Congress May 5, 1864, 13 St. 64, in aid of the construction of a railroad from St. Paul, Minnesota, to the head of Lake Superior, which came to be known as the Lake Superior & Mississippi Railroad. This withdrawal was made by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, May 26, 1864, after the filing and acceptance of a map of the general route of the Lake Superior & Mississippi Railroad, which indicated that the land would fall within the place limits of the grant made in aid of that road. The land was public in the full sense of the term at the date of the grant of May 5, 1864, and at the date of the withdrawal. The route of the Lake Superior and Mississippi road as definitely located September 25, 1866, by the filing and acceptance of the required plat, departed so far from the line provisionally indicated upon the map of the general route that this land fell entirely without the limits of the grant. The prior withdrawal was then impliedly, if not expressly, revoked as to all lands falling without the limits of the grant as adjusted to the line of definite location. It was during the existence of the withdrawal for the benefit of the Lake Superior & Mississippi Railroad that the grant of public land was made to the Northern Pacific Railroad Company by the act of July 2, 1864, *supra*. This land is within the place limits of that grant and the portion of that company's railroad opposite thereto was definitely located July 6, 1882. At that time this land was public land, not mineral, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. The Circuit Court held that land which at the date of the grant to the Northern Pacific Railroad Company was

included within a withdrawal like that made for the benefit of the Lake Superior and Mississippi Railroad did not come within the description of "public land" granted to the Northern Pacific Railroad Company and entered a decree dismissing the bill and supplemental bill. 134 Fed. 303.

The grant to the Northern Pacific Railroad Company is expressed in the third section of the act of July 2, 1864, *supra*, and reads as follows:

"SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, That the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided, further*, That all mineral lands shall be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided, further*, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said 'Northern Pacific Railroad.'"

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The grant to the Northern Pacific Railroad Company was one *in præsenti* and was in terms confined to "public land." St. Paul & Pacific R. R. Co. *v.* Northern Pacific R. R. Co., 139 U. S. 1, 5. Land not public at the date of the grant was not granted, even though it subsequently became of that character. Bardon *v.* Northern Pacific R. R. Co., 145 U. S. 535, 539; Northern Pacific Ry. Co. *v.* De Lacey, 174 U. S. 622, 626; United States *v.* Southern Pacific R. R. Co., 146 U. S. 570, 594, 606. The words "public land" have long had a settled meaning in the legislation of Congress and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is *reversed* by competent authority for any purpose or in any manner, although no exception of it is made. Bardon *v.* Northern Pacific R. R. Co., *supra;* Wilcox *v.* Jackson, 13 Pet. 498, 513; Leavenworth, etc., R. R. *v.* United States, 92 U. S. 733, 741, 745; Newhall *v.* Sanger, 92 U. S. 761; Doolan *v.* Carr, 125 U. S. 618, 630; Cameron *v.* United States, 148 U. S. 301, 309; Mann *v.* Tacoma Land Co., 153 U. S. 273, 284; Barker *v.* Harvey, 181 U. S. 481, 490; Scott *v.* Carew, 196 U. S. 100, 109. From the time of the earliest railroad land grants it was the practice of the chief officers of the land department, to whom was committed the administration of such grants, to withdraw from settlement, entry and sale the public lands along the line or route of the road so aided, in advance of its definite location, in order that the lands might be preserved for the ultimate satisfaction of the grant. Such withdrawals, where not made in opposition to the terms of the grant or other congressional enactment, have been uniformly declared to be reservations made by competent authority and to be efficient to remove the lands therein from the category of public land and to exclude them from subsequent railroad land grants, containing no clear declaration of an intention to include them, and this even though it subsequently transpired that the withdrawal was ill-advised or that the lands therein were not required for the satisfaction of the grant. Wolcott *v.* Des Moines Company, 5 Wall. 681, 688; Riley *v.* Welles, Book 19 L. Co. Op. ed. Sup. Ct. Reports, 648; Wolsey *v.* Chapman, 101 U. S. 755, 768; Wisconsin Central R. R. Co. *v.* Forsythe, 159 U. S. 46, 54, 55; Spencer *v.* McDougal, 159 U. S. 62; Northern Pacific R. R. Co. *v.* Musser-Sauntry Co., 168 U. S. 604, 607.

The application of these fixed rules of decision to the facts of the present case sustains the holding of the Circuit Court and requires that its decree be affirmed. At the date of the grant to the Northern Pacific Railroad Company the land now in controversy was embraced in a subsisting withdrawal made by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, for the purpose of preserving the land for the satisfaction of a prior grant in aid of the construction of another railroad, the provisional location of which, as shown upon the accepted map of its general route, indicated that the land would probably fall within

the place limits of that grant and would be required for its satisfaction The withdrawal was not made in opposition to the terms of the prior grant or of any other congressional enactment, and there is nothing in the subsequent grant to the Northern Pacific Railroad Company indicative of an intent on the part of Congress to use the words "public land" therein in a sense which would embrace lands at that time withdrawn or reserved for the protection of a prior grant. In short the subsequent grant, being *in præsenti* and confined to public land, did not embrace the land now in controversy because it was then excluded from the category of public land by reason of the subsisting withdrawal or reservation. It is true that after the date of the grant to the Northern Pacific Railroad Company and before the definite location of the line of that company's road the land was released from the withdrawal and thereupon became public in the fullest sense of the term, but this did not place it within the operation of a preceding grant *in præsenti* confined to land then public. The release simply restored it to the public domain and subjected it to future disposal under any law then applicable to it. The decision of the Supreme Court in Barlow v. Northern Pacific Railroad Co., *supra*, is conclusive on this point. The land there in controversy was part of an odd-numbered section, not mineral, within the place limits of the grant to the Northern Pacific Railroad Company made by the act of July 2, 1864, and to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of that company's road was definitely fixed, but it was not public land within the usual and settled meaning of that term at the date of the grant. It was then covered by a subsisting pre-emption entry theretofore wrongfully allowed without proof of the pre-emptor's compliance with the law. Shortly thereafter, and before the line of road was definitely fixed, the entry was canceled by the Commissioner of the General Land Office because of the absence of such proof and the money theretofore paid on the entry was refunded by the Government. There, as in the present case, it was contended that the status of the land at the date when the line of road was definitely fixed was the only criterion in determining whether or not it passed to the railroad company under the grant. In holding otherwise the court said (p. 538):

"It is thus seen that when the grant to the Northern Pacific Railroad Company was made, on the 2nd of July, 1864, the premises in controversy had been taken up on the pre-emption claim of Robinson, and that the pre-emption entry made was uncancelled; that by such pre-emption entry the land was not at the time a part of the public lands; and that no interest therein passed to that company. The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land, to which any claims or rights of others have attached, does not fall within the designation of public land. The statute also says that whenever, prior to the definite location of the route of the road, and of course prior to the grant made, any of the lands which would

otherwise fall within it have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands are to be selected in lieu thereof under the direction of the Secretary of the Interior. There would therefore be no question that the pre-emption entry by the heirs of Robinson, the payment of the sums due to the government having been made, as the law allowed, by them after his death, took the land from the operation of the subsequent grant to the Northern Pacific Railroad Company, if the pre-emption entry had not been subsequently cancelled. But such cancellation had not been made when the act of Congress granting land to the Northern Pacific Railroad Company was passed; it was made more than a year afterwards. As the land pre-empted then stood on the records of the Land Department, it was severed from the mass of public lands, and the subsequent cancellation of the pre-emption entry did not restore it to the public domain so as to bring it under the operation of previous legislation, which applied at the time to land then public. The cancellation only brought it within the category of public land in reference to future legislation. This, as we think, has long been the settled doctrine of this court."

And referring to the case of Leavenworth, etc., R. R. Co. *v.* United States, *supra*, in which a claim to lands under a railroad land grant was rejected where the lands were within an Indian reservation at the date of the grant, but at the date of the definite location of the line of the road had become public land in the proper sense of the term by reason of the termination of the reservation, it was also said (p. 543):

"Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in The Leavenworth Case; but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer, both to the government and to private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties."

Upon the filing and acceptance of the map showing the general route of its railroad the Lake Superior & Mississippi Railroad Company acquired an inchoate right to the odd-numbered sections public at the date of the grant of May 5, 1864, within the prescribed limits on each side of that route, and thereupon the land officers, anticipating that the line of definite location would substantially conform to the general route, withdrew these sections from pre-emption settlement and sale, thus placing them in a state of reservation for the benefit of that company and removing them from the category of public land. Such was the status of the land now in controversy when the grant was made to the Northern Pacific Railroad Company. Had the line of definite location of the Lake

Superior & Mississippi Railroad as subsequently established conformed to the line of its general route sufficiently to have brought the land within the place limits of the grant in aid of that road, there would be no question that the Lake Superior & Mississippi Railroad Company would thereupon have acquired a vested right to the land, as of the date of that grant, and that the same would not be within the operation of the grant to the Northern Pacific Railroad Company. Northern Pacific R. R. Co. *v.* Musser-Sauntry Co. 168 U. S. 604, 611; St. Paul & Pacific R. R. Co. *v.* Northern Pacific R. R. Co., 139 U. S. 1, 17; United States *v.* Southern Pacific R. R. Co., 146 U. S. 570, 595. As however the line of definite location of the Lake Superior & Mississippi Railroad departed materially from the general route no title to the land vested in the Lake Superior and Mississippi Railroad Company and the withdrawal or reservation was modified accordingly; but these matters, occurring subsequently to the grant to the Northern Pacific Railroad Company and therefore after the time in respect of which that grant must operate as one *in præsenti*, if at all, are without any bearing upon the decision of the present case unless, as before indicated, there is something in the granting act clearly indicative of an intent on the part of Congress to depart from the settled meaning of the words "public land" and to use them in a sense which would embrace lands then withdrawn and reserved for the satisfaction of a prior grant in aid of another railroad. Not only is there nothing in the act of July 2, 1864, indicative of such intent, but the clear import of the first proviso to section 3, *supra*, is that there was none. United States *v.* Southern Pacific R. R. Co., 146 U. S. 570, 605.

The reliance of counsel for the appellant seems to be on the cases of Northern Pacific R. R. Co. *v.* Sanders, 166 U. S. 620; Menotti *v.* Dillon, 167 U. S. 703; Nelson *v.* Northern Pacific Ry. Co., 188 U. S. 108; and United States *v.* Oregon & California R. R. Co., 176 U. S. 28. None of these cases has particular reference to or makes the decision turn upon the clause, "there be, and hereby is, granted * * * every alternate section of public land," which makes the grant one *in præsenti* of land then public, but instead each has particular reference to and makes the decision turn upon the limitation on the granting clause which makes it also requisite that "the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed." They all recognize the well established rule, that the grantee under a railroad land grant acquires, by designating the general route of its road, only an inchoate right to the odd-numbered sections granted by Congress and that until the definite location of the road these sections remain within the disposing power of Congress, and this even though they be withdrawn for the protection of the grant as in the present case; but there is nothing in this which is inconsistent with the rule, equally well established, that an intent to supersede such a withdrawal and to make other disposition of the lands covered thereby is not deducible from subsequent legislation relating to "public land," unless it contains something to indicate that that

term is used otherwise than according to its settled meaning. This is made clear in Menotti *v.* Dillon, where it was said (p. 719):

"It is said that the railroad company filed its map of general route on the 8th day of December, 1864, and that these lands having been withdrawn from pre-emption, private entry and sale by the executive order of January 30, 1865, they were not embraced by the act of 1866. In our opinion this is not a proper interpretation of that act. The proviso of the first section distinctly indicates certain cases to which the act should not apply; and, distinctly excluding those cases, but no others, from its operation, the act, in express words, confirmed to the State, 'in all cases,' lands which the State had theretofore selected in satisfaction of any grant by Congress and sold to purchasers in good faith under its laws."

In this connection it may be properly observed that the same rule which defeats the appellant in the present case was applied in favor of its grantor, the Northern Pacific Railroad Company, as much as fourteen years ago, in St. Paul & Pacific R. R. Co. *v.* Northern Pacific R. R. Co., 139 U. S. 1, 17, where it was said:

"Besides, the withdrawal made by the Secretary of the Interior of lands within the forty mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific Railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises."

The very earnest contention of learned counsel for the appellant that the question presented in this case is identical with that determined by the Supreme Court in United States *v.* Oregon & California R. R. Co., *supra*, justifies a somewhat extended statement respecting that case. Primarily the controversy arose out of a claimed conflict between the grant made to the Northern Pacific Railroad Company by the act of July 2, 1864, and the grant to the Oregon & California Railroad Company made by the act of July 25, 1866, 14 Stat. 239. March 6, 1865, Josiah Perham, President of the Northern Pacific Railroad Company, addressed to the Secretary of the Interior a communication transmitting to that officer a map said to designate the general route of the Northern Pacific Railroad and requested that it be filed in the office of the Commissioner of the General Land Office, and that an order of withdrawal be made of the lands along the route designated. The map was not accepted, because not sufficient as a map of general route, and no order of withdrawal was made thereon; nor was there ever any definite location or construction of the Northern Pacific Railroad opposite to the lands in suit. The road of the Oregon & California Company was definitely located and constructed, and the lands within the area of September 29, 1890, 26 Stat. 496, forfeited to the United States all lands theretofore granted to any corporation to aid in the construction of a railroad which were opposite to and co-terminous with the portion of such railroad not then completed and in operation. The purpose of the suit was to cancel the patents issued to the Oregon and California Railroad Company for the lands within the area claimed to be in conflict, the contention of the Government being

that the patents were issued without authority of law. It was stated in the opinion:

"This contention rests upon the assumption that the lands so patented—although within the limits of the grant contained in the act of July 25, 1866, and within the line of the Oregon Company as definitely located—were excluded from that grant because included in the grant previously made to the Northern Pacific Railroad Company by the act of July 2, 1864, * * * ; in which case, it is insisted that they were forfeited to the United States by the act of September 29, 1890, * * * and should be so adjudged."

The opinion does not disclose any contention on the part of the Government that the grant of July 25, 1866, being one *in praesenti* and confined to public land, did not include the lands in controversy because then withdrawn or reserved for the benefit of the prior grant. To the contrary it is said: "The contention of the government renders it necessary to ascertain what interest, if any, was acquired by the Northern Pacific Railroad Company in these lands by virtue of the act of July 2, 1864." Then, after stating that the grant made by that act was in the nature of a "float," no right or title to any particular section becoming "certain" until a definite location of the line of road, it was further said:

"If therefore the Perham map of 1865 were conceded for the purpose of the present discussion to have been sufficient as a map of 'general route'—and nothing more can possibly be claimed for it—these lands could not be regarded as having been brought by that map (even if it had been accepted) within the grant to the Northern Pacific Railroad Company, and thereby have become so segregated from the public domain as to preclude the possibility of their being earned by other railroad companies under statutes enacted by Congress after the filing of that map and before any definite location by the company of its line."

An extended reference to decided cases, particularly to Northern Pacific R. R. Co. *v.* Sanders and Menotti *v.* Dillon, *supra*, was then made, in the course of which it was declared that a general statement, in Buttz *v.* Northern Pacific R. R. Co., 119 U. S. 55, 72, to the effect that upon the designation of the general route of the Northern Pacific Railroad "the law withdraws" the odd-numbered sections within the prescribed limits for the protection of the grant, was too broad if intended to convey the thought that the designation of such route would prevent these sections from being granted by Congress to, and from being earned by, another railroad corporation prior to the definite location of the line of road. It was then said:

"As the grant contained in the act of July 2, 1864, did not include any lands that had been reserved, sold, granted or otherwise appropriated at the time the line of the Northern Pacific Railroad was 'definitely fixed;' as the route of the Northern Pacific Railroad had not been definitely fixed at the time the Company was definitely located; as the lands in dispute are within the limits of the grant contained in the act of 1866; as the route of the Oregon Railroad was definitely fixed, at least when the map showing that route was accepted by the Secretary of the Interior on the 29th day of Janu-

ary, 1870—the Northern Pacific Railroad Company having done nothing prior to the latter date except to file the Perham map of 1865; and as prior to the forfeiture act of September 29, 1890, there had not been any definite location of the Northern Pacific Railroad opposite the lands in dispute, there is no escape from the conclusion that these lands were lawfully earned by the Oregon Company and were rightly patented to it."

In a later case, United States *v.* Northern Pacific R. R. Co., 193 U. S. ..., 7, the question was presented as to what effect had been and should be given to the Perham map, and therefore as to what was decided in the former case, and it was said: "In United States *v.* Oregon & California R. R. Co., *supra*, it was held that if the Perham map were valid as a map of general route, it did not operate as a reservation." As no withdrawal was made by the officers of the land department along the route attempted to be designated by that map, and as the map did not of itself operate as a reservation, it follows that at the date of the grant of July 25, 1866, the lands in suit were not withdrawn or reserved for the benefit of the prior grant but remained within the category of public land. The case chiefly relied upon is therefore clearly distinguishable from the present one. The ultimate question decided in that case, as is indicated by the extracts before quoted from the opinion, was whether the grant of July 2, 1864, of itself excluded the lands in suit from the grant of July 25, 1866. Of course it did not. It did not identify them as within the limits of the grant, and, there being no definite location of the line of road opposite to them, they were never so identified.

The decree is affirmed.

Filed July 26, 1905.

(*Decree.*)

And on the twenty-sixth day of July, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1905.

No. 2219.

THE NORTHERN LUMBER COMPANY, Appellant,

vs.

WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN.

Appeal from the Circuit Court of the United States for the District of Minnesota.

WEDNESDAY, *July* 26, 1905.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin have and recover against the Northern Lumber Company the sum of twenty dollars for their costs herein and have execution therefor.

July 26, 1905.

(*Petition for and Order Allowing Appeal.*)

And on the twenty-first day of August, A. D. 1905, a petition for and order allowing an appeal was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN LUMBER COMPANY, Complainant and Appellant,
vs.
WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN, Defendant- and Appellees.

Now comes the Northern Lumber Company, a corporation, appellant in the above entitled cause and conceiving itself aggrieved by the decree affirming the decree of the Circuit Court made and entered in the above entitled cause on the 26th day of July, 1905, by the United States Circuit Court of Appeals for the eighth circuit, doth hereby appeal from said decree of the said United States Circuit Court of Appeals for the eighth circuit to the Supreme Court of the United States and this appellant prays that said appeal may be allowed and that a transcript of the record of proceedings herein, upon which said decree was made and entered, duly authenticated, may be presented to the Supreme Court of the United States.

JAMES B. KERR,
Solicitor for Complainant and Appellant.

And now, to-wit, this 19th day of August, 1905, it is ordered that the appeal prayed for by the above petition filed with the assignment of errors herein be and is hereby allowed.

WILLIS VAN DEVANTER,
Circuit Judge.

(Endorsed:) # 2219. U. S. Circuit Court of Appeals, 8th Circuit. Northern Lumber Co., *vs.* Wm. O'Brien, *et al.* Petition for Appeal and Order allowing Appeal. Filed Aug. 21, 1905. John D. Jordan, Clerk.

(*Assignment of Errors.*)

And on the twenty-first day of August, A. D. 1905, an assignment of errors was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN LUMBER COMPANY, Complainant and Appellant,
vs.
WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN, Defendant- and Appellees.

Assignment of Errors.

Comes now the above compla-nant and appellant, the Northern Lumber Company, and makes and files the following assignment of errors upon which it will *reply* upon its appeal from the decree of the court above named made and entered herein on the 26th day of July, 1905, as follows, towit:

I. The court erred in affirming the decree of the Circuit Court made and entered in this cause on the 24th day of January, 1905.

II. The court erred in not making and entering a decree in favor of the complainant and appellant, the Northern Lumber Company, and agains the defendants and appellees, William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, and not granting an injunction restraining said appellees from in any manner interfering with the property described in the original bill of complaint and the supplemental bill of complaint herein or taking timber therefrom without the consent of the appellant.

III. The court erred in not making and entering a decree that the complainant and appellant was the owner of the property described in the original bill of complaint and in the supplemental bill of complaint.

IV. The court erred in holding that the lands described in the bill of complaint and in the supplemental bill of complaint were not public lands on July 2, 1864, within the meaning of the act of congress entitled "An act granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by he northern route," approved July 2, 1864.

V. The court erred n holding that the land described in the bill of complaint and in the supplemental bill of complaint did not pass to the Northern Pacific Railroad Company under and by virtue of said act of congress approved July 2, 1864.

VI. The court erred in holding that the withdrawal of the lands described in the bill of complaint and in the supplemental bill of complaint by the Commissioner of the General Land Office for the benefit of the grant made to the state of Minnesota entitled "An act making a grant of lands to the state of Minnesota to aid in

the construction of a railroad from St. Paul to Lake Superior," approved May 5, 1864, took the lands described in the bill of complaint and in the supplemental bill of complaint out of the category of public lands within the meaning of said act of congress approved July 2, 1864.

VII. The court erred in holding that the defendants and appellees were the owners of the land described in the bill of complaint and in the supplemental bill of complaint.

VIII. The court erred in holding that the complainant and appellant was not the owner of the lands described in the bill of comp-aint and in the supplemental bill of complaint.

IX. The court erred in dismissing the bill of complaint and the supplemental bill of complaint of complainant and the decree is erroneous in so ordering and adjudging.

Wherefore the complainant and appellant, the Northern Lumber Company, prays that said decree of the Circuit Court of Appeals of the United States for the eighth circuit be reversed with directions to render and enter a decree in favor of complainant and appellant and against defendants and appellees in accordance with the prayer for this appeal and the prayer of the bill of complaint and the supplemental bill of complaint in this case.

JAMES B. KERR,
Solicitor for Complainant and Appellant,
Northern Lumber Company.

(Endorsed:) # 2219. U. S. Circuit Court of Appeals, 8th Circuit. Northern Lumber Co., *vs.* Wm. O'Brien, *et al.* Assignment of Errors. Filed Aug. 21, 1905. John D. Jordan, Clerk.

(*Bond on Appeal.*)

And on the twenty-first day of August, A. D. 1905, a bond on appeal was filed in the Clerk's office of said Circuit Court of appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN LUMBER COMPANY, Complainant and Appellant,
vs.
WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN, Defendants and Appellees.

Know all men by these presents, That we, the Northern Lumber Company, a corporation, as principal and F. E. Weyerhaeuser and A. E. Macartney of the city of St. Paul, and state of Minnesota, as sureties, are held and firmly bound unto William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin in the full and just sum of five hundred dollars ($500.00) to be paid to said William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, their attorneys, executors, administrators or assigns,

to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 19th day of August in the year of our Lord one thousand nine hundred and five.

Whereas lately at a session of the Circuit Court of Appeals of the United States for the eighth circuit in the suit pending in said court between said Northern Lumber Company, complainant and appellant, and William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, defendants and appellees, a decree was rendered against the said Northern Lumber Company and the said Northern Lumber Company having obtained from said court an order allowing the appeal to the Supreme Court of the United States to reverse the decree so rendered in the aforesaid suit and a citation directed to the said William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin is about to be issued citing and admonishing them to be and appear at the United States Supreme Court at the city of Washington, District of Columbia:

Now therefore, the condition of the above obligation is such that if the said Northern Lumber Company shall prosecute its said appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then this obligation is to be void; otherwise to remain in full force and virtue.

NORTHERN LUMBER COMPANY,
By F. E. WEYERHAEUSER.
F. E. WEYERHAEUSER. [SEAL.]
A. E. MACARTNEY. [SEAL.]

STATE OF MINNESOTA, *County of Ramsey, ss:*

F. E. Weyerhaeuser and A. E. Macartney being first duly sworn, on oath each for himself deposes and says that he is a resident and freeholder of the district of Minnesota and that he is worth the sum mentioned in the above bond and obligation over and above all just debts and liabilities and exclusive of property exempt from execution and property situated in the district of Minnesota.

F. E. WEYERHAEUSER.
A. E. MACARTNEY.

Subscribed and sworn to before me this 19th day of August, 1905.

[SEAL.] WILLIAM T. GODDARD,
Notary Public, Ramsey County, Minnesota.

My commission expires April 5th, 1909.

The foregoing bond and sureties therein are hereby approved this 19th day of August, 1905.

WILLIS VAN DEVANTER,
Circuit Judge.

(Endorsed:) # 2219. United States Circuit Court of Appeals. Northern Lumber Co., Appellant, *vs.* William O'Brien, *et al.*, Appellees. Bond on Appeal. Filed Aug. 21, 1905. John D. Jordan, Clerk.

(*Citation.*)

And on the fourth day of September, A. D. 1905, a citation was filed in the Clerk's office of said Circuit Court of Appeals, the original of which with the admission and affidavit of service is hereto attached and herewith returned.

187.

Affidavit of Service.

STATE OF MINNESOTA, *County of St. Louis, ss:*

United States Circui Court of Appeals for the Eighth Circuit.

NORTHERN LUMBER COMPANY, Complainant & Appellant,
vs.
WILLIAM O'BRIEN ET AL.

STATE OF MINNESOTA, *County of St. Louis, ss:*

A. C. Gillette of the City of Duluth County of St. Louis in the State of Minnesota, being duly sworn, says, that at the City of Duluth in the County of St. Louis and State of Minnesota, on the 1st day of September 1905 he served the annexed Citation on Mary E. Coffin one of the Defendants in this action, by showing her the original and leaving with her personally a copy of said Citation. He further says that he knew the person served as aforesaid, to be the person mentioned and described in the said Citation as one of the Defendants therein.

A. C. GILLETTE.

Subscribed and sworn to before me, this 1st day of September 1905.

[NOTARIAL SEAL.] F. M. EMANUELSON,
Notary Public, St. Louis, Minn.

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN LUMBER COMPANY, Complainant and Appellant,
vs.
WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS, and MARY E. COFFIN, Defendants and Appellees.

UNITED STATES OF AMERICA, *ss:*

To William O'Brien, Albert J. Lammers, George A. Lammers, and Mary E. Coffin, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the City of Washington, in the District of Columbia, within thirty (30) days from

the date hereof, pursuant to an appeal duly taken and allowed from that certain decree of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the Northern Lumber Company is complainant and appellant and you, William O'Brien, Albert J. Lammers, George A. Lammers and Mary E. Coffin, defendants and appellees, to show cause, if any there be, why the order and decree of affirmance in the said appeal mentioned should not be set aside and corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 19th day of August, 1905.

WILLIS VAN DEVANTER,
Circuit Judge.

[Endorsed:] U. S. Circuit Court of Appeals, 8th Circuit. Northern Lumber Company *vs.* Wm. O'Brien *et al.* Citation. Filed Sep. 4, 1905. John D. Jordan, Clerk.

Due service of this instrument and receipt of copy thereof admitted at Stillwater Minn. this 23d day of August 1905.

J. N. SEARLES,
Attorney for O'Brien et als., Defendants and Appellees.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing eighty-five pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said Circuit Court of Appeals, in a certain cause in said Court wherein The Northern Lumber Company was Appellant, and William O'Brien, *et al.*, were Appellees, No. 2219, May Term, 1905, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation, with an affidavit of service attached thereto and an admission of service endorsed thereon, is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this sixth day of September, A. D. 1905.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 19,915. U. S. circuit court of appeals, 8th circuit. Term No. 121. The Northern Lumber Company, appellant, *vs.* William O'Brien, Albert J. Lammers, George A. Lammers, and Mary E. Coffin. Filed September 29th, 1905. File No. 19,915.